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VOL. IX DECEMBER, 1936 No. 2

THE STATE AND THE SOCIAL PROCESS*

Sydney Smith†

Life, in all of its departments, has ceased to be static and has become dynamic. We are passing through one of the ever-recurring periods in which men strive to shake off the "dead hand of the past," and bring all their institutions into accord with social and economic facts, not as they once were, but as they now are.

This is true in the field of law—the State's Primary Social Process. We are striving to rid our jurisprudence of its formal legalistic individualism and to make it pragmatic and sociological. The sociological movement, which, as Professor Small, writing in 1908,[1] said, "is a frank endeavor to secure for the human factor in experience the central place which belongs to it in our whole scheme of thought and action," entered actively into the field of American Jurisprudence near the close of the last century, and is slowly becoming a dominant factor in our juristic thought. Sociological jurists are thus described by Dean Pound:[2]

1. "They look more to the work of the law than to its abstract content;
2. "They regard law as a social institution which may be improved by intelligent human effort, and hold it their duty to discover the best means of furthering such effort;
3. "They lay stress upon the social purposes which the law subserves rather than upon sanction;
4. "They urge that legal precepts are to be regarded more as social guides to results which are socially just, and less as inflexible molds."

"The main problem," as Dean Pound further says,[3] "to which sociological jurists are addressing themselves today is to enable

*An address delivered before the Law School of the University of Mississippi, under auspices of Phi Delta Phi Legal Fraternity, on October 7, 1936.

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[1]Small, *The Meaning of Sociology* (1908) 14 AM. J. OF SOCIOLOGY 13.

[2]Pound, *Scope and Purpose of Sociological Jurisprudence* (1912) 25 HARV. L. REV. 516.

[3]*Id.* at 512.

and to compel law-making, and also interpretation and application of legal rules, to take more account, and more intelligent account, of the social facts upon which law must proceed and to which it is to be applied."

With this preface to what I intend to say, I come to my subject: The State and The Social Process. By "The Social Process," I, of course, mean the continued, forward movement of society toward the end for which it exists. The two institutions that contribute most to this forward movement are: (1) the Church, or if you prefer, Religion; and (2) the State. I am concerned here, and will deal only, with the latter.

According to Aristotle—the master of those who know—"The State exists for the sake of a good life," i.e., to promote justice and happiness. This concept of the state was even then age-old, for Hammurabi, nearly two thousand years before, prefaced his Code with the words: "Law and Justice I established in the land. I made happy the human race in those days." It was the main thesis around which John Locke built his political theories, from whom it came to our "founding fathers"; was embedded by them in the Declaration of Independence and the preamble to our national constitution; and has been expressly declared by the Supreme Court of the United States,[4] and of Mississippi.[5] Happiness may be here defined "as the enjoyment, or pleasurable satisfaction, attendant upon welfare of any kind," bodily, mental, or spiritual. Man's basic wants are food, shelter, and clothing. The satisfaction of these wants suffices for the savage, but happiness for the great mass of civilized men and women does not exist unless they have also some education and leisure for cultural, social and domestic life. The state, of course, cannot confer happiness; but it can, and its duty is to, create institutions and promote conditions that will enable individuals to pursue and attain it.

When the American states were formed, life in all of its departments, particularly in the economic, was simple; an opportunity for acquiring economic fruits was common to all. Land, to which access was easy, was the principal source of wealth. There were no very rich, and few very poor; and few, if any, possessed sufficient economic power to enable them to dominate the economic life of others. The then economic situation was thus described by Thomas Jefferson in a letter to John Adams: "Here every one may have land to labor for himself, if he chooses; or preferring the

[4]The Charles River Bridge v. The Warren Bridge, 11 Pet. 420, 9 L. ed. 773 (1837).

[5]Notgrass Drug Company v. State, . . . Miss. . . . , 165 So. 884, 885 (1936).

exercise of any other industry, may exact for it such compensation as not only to provide for a comfortable subsistence, but wherewith to provide for a cessation from labor in old age." There was then no occasion for the state to interfere with the economic life of its citizens. Adam Smith's doctrine of *laissez-faire* applied and was then rightly acted upon; for that government is best which governs only insofar as the necessities of its citizens require. A very different situation confronts us today, as Jefferson feared, should we (as we did) adopt and act upon Hamilton's economic policies. Because of the disappearance of unoccupied land and the increase in population, the many are barred from access to land; and the substitution of the machine for manual labor, with its complex monopolistic industrial system, has destroyed freedom of the "exercise of any other industry" and of "exacting for it such compensation" as will satisfy immediate and future economic wants. The many have been brought to economic dependence on the few, resulting in their being unable to obtain a fair share of economic fruits.

In his *Man, The Unknown*, Alexis Carrel says, "Modern industry is based on the conception of the maximum production at lowest cost in order that an individual or group of individuals may earn as much money as possible," to which this may be added: on its productive side the system has been a complete success, producing sufficient material goods for all; on its distributive side, it has been, at least, a partial failure. It has permitted wealth, produced by the toil of the many, to be largely accumulated in the hands of the few, resulting in poverty and suffering being the undeserved lot of many. In 1927, the peak of our supposed prosperity, more than twelve million American citizens, without fault on their part, were living near the breadline; and four or five million others, also without fault on their part, were unable to obtain work and were dependent upon charity for the necessities of life. A social and industrial system under which such a condition arises cannot, and should not, long survive. If the state is to promote the happiness of its citizens, it must abandon *laissez-faire*—a doctrine that is an anachronism in a state that exists to make life good, and which the American states have already partially abandoned—and secure to all of its citizens an equal opportunity to obtain a fair share of economic fruits.

Let us now turn from Happiness to Justice. Justice "consists in giving to every man his rights." Among these rights are "life, liberty, and the pursuit of happiness." Liberty and the pursuit of happiness include the "enjoyment upon terms of equality with all others, in similar circumstances, of the privilege of pursuing an

ordinary calling or trade, and of acquiring, holding, and selling property."[6]

In a state where democracy is not only the established form of government, but is accepted and acted upon by individuals as a way of life, all will render to each his rights without compulsion from the state. But the trouble with us, and for that matter with all peoples, is that we have not fully accepted democracy as a way of life; and a mistaken view of self-interest sometimes prevents us from according to others their economic rights. When this occurs, it is the duty of the state—within limitations I cannot here discuss —to protect the individual from economic injustice. The fundamental elements of our system of government have never been more clearly set forth than in the writings of Hamilton, Madison, and Jay, which have been collected under the title of "The Federalist." In No. 50 thereof, Hamilton declared: "It is of great importance in a republic, not only to guard the society against oppression of its rulers, but to guard one part of the society against the injustice of the other part . . . . Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued, until it is obtained, or until liberty be lost in the pursuit."

In order to promote justice, the state must protect liberty, which is one of its essential elements. Liberty, in the sense I am here using it, means "freedom from external human restraint by which one is subjected to the will of another." Such restraint may be imposed (1) by the state; and (2) by individuals acting within what the state permits. The state protects liberty in two ways: (a) by not itself arbitrarily abridging it; and (b) by preventing individuals from so doing—by abridging the liberty of some in order to preserve the liberty of all. That the state has the right and is charged with the duty of abridging the liberty of some insofar as (but no further than) is necessary for the preservation of the liberty of all, is so universally admitted that I shall not pause to discuss it. The liberty with which we are here concerned is economic liberty, and the restraints thereon are such as are imposed, not by the state, but by individuals acting separately or in concert.

Another essential of justice is equality, by which liberty is conditioned—in fact, is guaranteed; and among civilized men the love of equality is stronger than the love of liberty. An interesting discussion of the relation of equality to liberty will be found in De Tocqueville's *Democracy in America.* In the first chapter of the second book of the second part of which, he said:

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[6]Butchers' Union, etc. v. Crescent City, etc.. 111 U. S. 746, 28 L. ed. 585 (1884); Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 263 (1888).

> "Political liberty bestows exalted pleasures, from time to time, upon a certain number of citizens. Equality every day confers a number of small enjoyments on every man. The charms of equality are every instant felt, and are within the reach of all; the noblest hearts are not insensible to them, and the most vulgar souls exult in them. . . . . Amongst these nations (European) equality preceded freedom: equality was therefore a fact of some standing when freedom was still a novelty: the one had already created customs, opinions, and laws belonging to it, when the other, alone and for the first time, came into actual existence. Thus the latter was still only an affair of opinion and of taste, whilst the former had already crept into the habits of the people, possessed itself of their manners, and given a particular turn to the smallest actions of their lives. Can it be wondered that the men of our own time prefer the one to the other? I think that democratic communities have a natural taste for freedom: left to themselves, they will seek it, cherish it, and view any privation of it with regret. But for equality, their passion is ardent, insatiable, incessant, invincible; they call for equality in freedom; and if they cannot obtain that, they still call for equality in slavery. They will endure poverty, servitude, barbarism—but they will not endure aristocracy. This is true of all times, and especially true in our own. All men and all powers seeking to cope with this irresistible passion, will be overthrown and destroyed by it. In our age, freedom cannot be established without it, and despotism itself cannot reign without its support."

This pronouncement of De Tocqueville was not only true when made, but was prophetic of the present; for the underlying cause of the domestic troubles in Europe is economic inequality, to escape from which dictatorships—either of the Right or of the Left—have been established and liberty destroyed.

The state has the negative duty of not itself abridging economic equality, but it also has the positive duty of insuring that equality. In *U. S. v. Cruikshank*,[7] the Supreme Court said: "Equality of the rights of citizens is a principle of republicanism. Every Republican government is in duty bound to protect all of its citizens in the enjoyment of this principle if within its power."

Freedom of one from economic restraint by another that subjects him economically to such other's will, is secured only by eco-

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[7] 92 U. S. 542, 23 L. ed. 588 (1875).

nomic equality, without which, for the common man, economic liberty does not exist. Herbert Crowley[8] puts it exactly when he says: "Individuals constituting a democracy lack the first essential of individual freedom when they cannot escape from the condition of economic dependence." This is the theory upon which congress and the legislatures act in enacting social and economic welfare statutes. In *Adkins v. Children's Hospital*,[9] Chief Justice Taft said: "Legislatures, in limiting freedom of contract between employee and employer by a minimum wage, proceed on the assumption that employees in the class receiving least pay are not upon a full level of equality with their employer, and in their necessitous circumstances are prone to accept pretty much anything that is offered. They are peculiarly subject to the overreaching of the harsh and greedy employer." By economic equality, I do not mean equality in wealth. That, if possible, might not be desirable, and certainly would not be if brought about by direct state action. What I mean is equality of opportunity for obtaining a fair share of economic fruits.

In saying that the state, in order to promote justice and happiness, must insure the economic equality of its citizens—by which let me again say that I mean equality of opportunity for obtaining a fair share of economic fruits—I am stating nothing new or startling; for that such is the state's duty is firmly embedded in American political and juristic thought. It underlies our usury statutes and many others, enacted since 1880, among which are: statutes prohibiting combinations and conspiracies in restraint of trade; for the supervision of public utilities; regulating the conditions, hours, and wages of labor; for agricultural adjustment; creating and defining the duties of the departments of commerce and labor; and many other statutes enacted under Theodore Roosevelt's "Square Deal," Woodrow Wilson's "New Freedom," and Franklin D. Roosevelt's "New Deal."

Returning for a moment to liberty, let me say this: Liberty rests upon and is "inextricably intertwined" with property, and the law has developed around the basic concept that liberty can only be effectually protected by making property secure. This concept was thus aptly put by Justice Van Orsdel of the Court of Appeals of the District of Columbia in *Children's Hospital v. Adkins*:[10] "It should be remembered that of the three fundamental principles which underlie government, and for which government exists, the protection of life, liberty, and property, the chief of these is property; not that any amount of property is more valuable than the life or

[8] CROWLEY, THE PROMISE OF AMERICAN LIFE (1919) 205.
[9] 261 U. S. 525, 562, 67 L. ed. 785, 798 (1922).
[10] 284 Fed. 613, 622 (App. D. C. 1921).

liberty of the citizen, but the history of civilization proves that, when the citizen is deprived of the free use and enjoyment of his property, anarchy and revolution follow, and life and liberty are without protection."

Another reason for making property secure is, as said by Walter Lippman,[11] and demonstrated by Professor McIlwain,[12] "Private property was the original source of freedom. It still is its main bulwark." In medieval political thought "neither Pope nor King could take a subject's goods without his consent" (McIlwain, *op. cit.* p. 367). This gave men economic security and enabled them to exact liberty from their rulers in return for economic favors. Liberty exists today only in states whose citizens are economically secure.

We must not, however, press the security of property too far. The maxim, "nothing too much," applies everywhere and always. If we do, the result will be that essential human rights—rights that inhere in human beings as such—will be unnecessarily sacrificed to property rights. To the sociological jurist property rights are valuable and should be protected; but human rights are of more value and can be protected without undue interference with property rights.

Democracy is not exempt from the universal law, thus phrased by Professor Small,[13] "Progressive functional adaptation to conditions that change in the course of the functioning is human destiny." If democracy is to live, it must continually readapt itself to new and changing modes of life, and always promote conditions under which the mass of men can possess actual, as distinct from mere legal, liberty. If economic equality is not restored, democracy as a form of government will perish. The generation to which I belong failed to do this. It must be done by your generation; peaceably by what John Dewey calls "freed intelligence"; if not, it will be done violently by revolution. It must be done, if democracy is to survive, by methods that will preserve freedom of judgment and of speech, private ownership of property, and individual initiative; in other words, within the framework of the American system of government—by Due Process of Law.

What then is Due Process of Law? The term was recently said by Mr. Justice Stone to be "vague and indefinite." On its face it is; but in American political and juristic thought it has a clear and definite meaning and embodies a principle that lies at the

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[11] LIPPMAN, THE METHOD OF FREEDOM (1934) 101.

[12] MCILWAIN, THE GROWTH OF POLITICAL THOUGHT IN THE WEST (1932) 367 *et seq.*

[13] Small, *A Decade of Sociology* (1906) 11 AM. J. OF SOCIOLOGY 1.

heart of democracy as a form of government. That principle was set forth in Magna Charter by the words "Law of the Land," which in later promulgations of the Charter were changed to "due process of law." The principle embodied therein became one of the basic concepts of the common law; and when the American governments were formed, it had come to mean that the state, in all of its departments—executive, legislative, and judicial—is without the right (though it might usurp the power) to arbitrarily interfere with the liberty of its citizens. It means now what it meant to our Colonial forefathers when they embodied it in our national and first state constitutions by providing therein that "No person shall be deprived of life, liberty, or property without due process of law," or words of like effect. Specifically, it means simply this: the state is without the right to deprive any person of life, liberty, or property by an act that has no reasonable relation to any proper governmental purpose, or is so far beyond the necessities of the case as to be an arbitrary exercise of governmental power. This is the test which the courts apply when deciding whether a governmental act is within due process of law. It is also the test which sociological jurisprudence, independent of the constitutional requirement to so do, applies to governmental acts and legal principles.

The difficulty in applying this test lies not in its vagueness, but in the factual elements on which it rests. Whether an act has any reasonable relation to a proper governmental purpose or is beyond the necessities of the case, is a question of fact and of inferences to be drawn from facts—political, economic, and social—existing not at the time our governments were organized, but at the time the act in question was committed. Men may disagree as to what these facts are and as to the inferences to be drawn therefrom, but the difficulty there arising is more apparent than real and is caused mainly by our, sometimes unconscious, effort to test the act by what we conceive to be its wisdom or expediency, neither of which has any relation to due process of law. I am not here concerned with, and will not discuss, the fact that, with us, it is for the courts to finally say whether a governmental act is within due process of law; or with how successfully the courts have discharged that duty. I am dealing only with the test that sociological jurisprudence applies, or should apply, to governmental acts which it sanctions.

The task to which I have called your attention—Restoration of Economic Equality without destroying Liberty—is delicate and difficult, but is also a challenging, and not impossible, one. For its discharge we have no clear guide. History, both of the distant and the near past, cannot furnish us with such. The great in-

dustrialist, Henry Ford, said that "History is bunk,"—an exaggeration, probably intended to sharply direct attention to the profound truth at its core, that, as said by John Morley,[14] "History's direct lessons are few; its specific morals rare." While history cannot solve our problems, it should teach us to examine, to "stop, look and listen," before discarding the old and taking on the new—to "prove all things; hold fast that which is good."

Nor have we such a guide in the law of Nature, so dear to our Eighteenth Century forefathers, with its theory of inalienable rights pressed to the breaking point. Indeed, it is that school of jurisprudence which has steered us into the near *impasse* which now confronts us.

The task can be discharged only by adopting the methods of thought and action of the sociological jurist who believes that "the destinies of men are the most important objects of human interest"; whose thinking is empirical and pragmatic; who believes with the late Mr. Justice Holmes that "The life of the law has not been logic: it has been experience"; and who is not afraid to proceed by the method by which all good laws are made—trial and error.

May I express the hope that you will equip yourselves for it. In order to do this you must discard the theory that "the law library is the (sole) laboratory of the student." The law library is an indispensable part of that laboratory, but another indispensable part of it is a knowledge of social and economic conditions. We may not go all the way with the late Professor Henderson when he said that[15] "One can hardly escape from the conclusion that a lawyer who has not studied economics and sociology is very apt to become a public enemy; and many a good judge would be hurtful if he did not get through newspapers and magazines a diluted kind of sociology which saves him from bondage to mere precedent"; but we can agree with him that "Reformation does not come from a law library, which has its useful function in conservatism; it comes from a complete mastery of the real world, and a moral judgment as to what ought to be and is not yet. . . . Without this study of sociology and economics we may have acute interpreters of legal phraseology, shrewd money-getters, advisers of corporations; but we cannot have the best type of leaders of social progress."

One word of warning and I am through. Do not attempt to use the sociological method unless you are equipped therefor. In summarizing a passage in Mr. Justice Cardozo's *The Nature of the Judicial Process,* Dean (now Mr. Justice) Stone said: "In short

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[14] MORLEY, POLITICS AND HISTORY (1914) 104.
[15] Henderson, Review (1906) 2 AM. J. OF SOCIOLOGY 847.

the method of sociology is the method which the wise and competent judge uses in rendering the dynamic decisions which makes the law a living force. . . . The weak and incompetent judge (to which I would add "and lawyer") cannot use it and indeed in his hand it is a dangerous instrument, for the only guide for its use is judicial wisdom." With this I am in thorough accord.

RESTITUTION OF PROPERTY TRANSFERRED UNDER VOID OR LATER REVERSED JUDGMENTS

*Charles W. Tainter, 2d.**

INTRODUCTORY[1]

The very existence of the hierarchy of courts of appellate jurisdiction postulates the possibility of defect in legal proceedings, and the necessity of providing machinery whereby the results of any such defect may be cured. The defect may appear at the outset, in the form of lack of jurisdiction over a party or over the subject matter, or it may appear at a later stage in the form of error of the court. Whatever form it may take, it is essential that the successful party be able to get some good from his judgment without waiting for the leisurely progress through the courts, in case of appellate proceedings, to come to an end.[2] The validity of the claim of the successful party is so generally recognized that it is rarely mentioned by the courts, and when mentioned is regarded as arising from an inherent power of courts to enforce their own decrees and judgments.[3] Analogously, it is universally held that

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[1]For the purpose of this paper property is transferred under a judgment when the successful party is paid by the loser, or when property of the loser is sold toward the satisfaction of a judgment or decree and the proceeds paid or credited to the winner, or where there is a transfer of title or possession, or a retention thereof by the winner under a judgment or decree.

[2]An example of this leisurely progress is seen in Clary v. Marshall's Heirs, 4 Dana 96 (Ky. 1836) where nearly ten years elapsed between a decree for specific performance and its reversal on bill of review.

In Eich v. Czervonko, 330 Ill. 455, 161 N. E. 864 (1928) it was held that a writ of error, in a suit for specific performance, started a new *lis pendens* because (*id.* at 460) otherwise the party gets no benefit from his decree for two years. See also South Fork Canal Co. v. Gordon, 2 Abb. 479, 487, Fed. Cas. No. 13,189 (C. C. 9th, 1868). The Supreme Court of Texas, while it reached an opposite result, recognized the claim of the successful party in Harle v. Langdon's Heirs, 60 Tex. 555, 560 (1883) where it said: "If the time for prosecuting appellate proceedings is too long it rests with the legislature to change it."

[3]The court spoke, in Peck v. McLean, 36 Minn. 228, 231 (1886), of an erroneous judgment as the act of the court, valid until reversed, and said that a party who was unable to recover his property *in specie* on reversal suffered a hardship which was generally the result of his own acts in failing to obtain a supersedeas, thus leaving the judgment in force and enforceable. In Barney v. Patterson, 6 Har. & J. 182, 204 (Md. 1823) it was said, "If [the titles of third parties purchasing at execution sales were not perfect] writs of execution would be of little effect." See also Glaze v. Johnson, 65 S. W. 662, 664 (Tex. Civ. App. 1901). In Sneed v. Reardon, 1 A. K. Marsh. 217, 218 (Ky. 1818) it was said, "As the judgment and execution confer a sufficient authority to the sheriff to sell . . ." The same attitude appears in the early English decision, Manning's Case, 8 Co. 96a, 97a (1609) where it was said, "By force of [*fieri facias*] the Sheriff sold the term . . . as he well might," and even more summarily in Anon., Dyer 363 (1578), where the decision that the defendant,

no action in tort arises from any act authorized by an unsuperseded judgment or decree.[4]

The right of the successful party, however, is conditional at least upon his having a good cause of action,[5] and if his judgment is reversed he must, usually, make restitution in some form to the successful appellant. It is the purpose of this paper to examine the circumstances on which are based the claims to restitution made by successful appellants, and the manner and measure of such restitution in those cases where the validity of such claims is recognized by the courts.

Assuming that there has been a judgment which the successful plaintiff has enforced, and that this judgment has been reversed[6] after it has been satisfied by a money payment by the defendant, by money obtained from the proceeds of an execution or other judicial sale under the judgment, by transfer of possession—whether quasi-voluntary or by the directed action of an officer of the court —or by adjudication of a right in the specific property, it becomes necessary, first, to determine what interests the court must weigh in order to decide whether restitution shall be made to the successful appellant and, if so, what form the restitution shall take.[7]

In the simplest case, where real or personal property is transferred *in specie* under a judgment and is retained by the transferee, interests affecting only two persons are involved. This is not a case of transfer of title, but of adjudication of a title already exist-

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on reversal, was entitled to restitution only of the proceeds of a sale of his property on *fieri facias* was justified by the words "because it was legally sold."

[4]Field v. Anderson, 103 Ill. 403 (1882); State Nat'l. Bank v. Ladd, 65 Okla. 14, 162 Pac. 684 (1917); Porter v. Small, 62 Ore. 574, 120 Pac. 393 (1912). In Hess v. Deppen, 125 Ky. 424, 431, 101 S. W. 362, 363, it was said that the reason for such decision was that the error was that of the court, which does not act for the plaintiff in ordering and having a sale made. See Tenth Ward Road Dist. No. 11 of Avoyelles Parish v. Tex. & P. Ry., 12 F. (2d) 245, 248 (C. C. A. 5th, 1926); Marks v. Cowles, 61 Ala. 299, 303 (1878); Ward v. Sherman, 155 Cal. 287, 291, 100 Pac. 864 (1909); Bridges v. McAllister, 106 Ky. 791, 796, 51 S. W. 603 (1889); Cummings v. Noyes, 10 Mass. 433, 435 (1813); Peck v. McLean, 36 Minn. 228, 231, 30 N. W. 759 (1886); Gay v. Smith, 38 N. H. 171, 176 (1859).

[5]This restricted statement represents the rule in those states which are most favorable to the successful plaintiff, whose judgment is later reversed for some error not going to the merits of the cause of action. In many states, as will be shown later, the successful appellant need show only the fact of reversal to be entitled to full restitution.

[6]In this connection, and generally throughout this paper, the word "reversed" is to be taken to indicate the result of the action of "any court vacating a judgment" [see Kazebeer v. Nunamaker, 82 Neb. 732, 737, 118 N. W. 646, 648 (1908)], or of "any court authorized to set aside a judgment" [see Manfull v. Graham, 55 Neb. 645, 649, 76 N. W. 19, 21 (1898)].

[7]It is the purpose of the writer only to list here the interests involved. The results of the weighing of interests and the manner in which they are secured will be discussed below as indicated in notes 8-13.

ing and the simple method of restitution is *in specie*.[8] Where there is a money judgment, and payment thereon before reversal, in general, the same interests are involved and restitution by repayment of the money is usual.[9] Where the successful plaintiff purchases the property of the other party at execution or other judicial sale, or where he obtains satisfaction from the money received by sale to some other person, the interests, as between the parties, are still the same.[10]

If third persons, not parties to the judgment nor privy to it, purchase the property involved from the party who acquired it by transfer *in specie* under a judgment, their interests must be weighed with those of the parties with respect to confidence in the regularity of judicial administration as well as with respect to the interests in the property.[11] If the purchase is made from the party who bought at a sale under the judgment the same interests are to be considered.[12] If a third person purchases at a sale under the judgment the interests of that person are, as to the property, to be weighed with those of the successful plaintiff.[13]

I. Property Transferred *in specie*[14]

In this situation an adjudication is made, as between the parties, of some antecedent right in the property itself. The decision may establish a claimed legal title as in actions of ejectment or of trespass to try title, or it may create a new legal title as in suits for specific performance. It is to be noted, however, that there is never the creation of a new title by way of a transaction involving the elements of a purchase. There is simply an adjudication of some kind of right,[15] and the remedy given in the original action is of an appropriate form to enforce the right. Upon reversal no interests are considered except those affecting the parties, who have some kind of property relation between them.

Since the acquisition of property by the appellee arose solely by force of the reversed judgment and this judgment was erroneous, the courts require him to restore *in specie* any property of

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[8]See pp. 159-162 *infra*.
[9]See pp. 162-168 *infra*.
[10]See pp. 173-178 *infra*.
[11]See pp. 179-182 *infra*.
[12]See p. 179 *infra*.
[13]See pp. 168-173 *infra*.
[14]Transfers of property must be understood to include retention of any type of interest by a party as well as any actual passage of interest between the parties (see note 1, *supra*). The types of judgments to be considered include judgments at law—*e. g.*, detinue, ejectment—and decrees in equity—*e. g.*, specific performance, partition, quieting title.
[15]See Lord v. Hawkins, 39 Minn. 73, 76, 38 N. W. 689 (1888).

which he gained possession[16] and declare at an end any legal title which he obtained.[17] The interest which is most clearly recognized by the courts is that in the freedom from arbitrary action of public officials—the result is expressed as being simply the court

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[16]*Contra*: Traun v. Keiffer, 31 Ala. 136 (1857); *Ex parte* Wellden, 148 Ala. 429, 42 So. 632 (1906). In *Ex parte* Wellden, it was held that the plaintiff's bond completely protected the appellant in detinue. In Traun v. Keiffer, a motion for restitution was denied, on reversal in action of detinue, when the the motion was not made until the case was about to be retired on the merits. The court said (31 Ala. at 143): "If the property and money belong to the plaintiff, it would be extremely unjust to compel the restoration of them to the wrongful possession of the defendant."

Compare cases in which a party is denied restitution in assumpsit when he has paid an opponent's claim after suit brought [Brown v. McKinally, 1 Esq. 279 (Nisi Prius 1795)] even where suit was begun by attachment [Dickerman v. Lord, 21 Ia. 338 (1866)]. The principle behind these decisions is that the cause of action relied on for restitution would have been a complete defense in the action in which payment was made; and that the payor would have had his day in court as satisfactorily as defendant in that suit; and that he was not entitled by making a payment to choose to have a different day in court. In the Traun case, the property was taken from the appellant by duress of law, but, since he waited to move for restitution until a time when he was about to have his day in court, he could not thus choose a different day. See also St. L. & S. F. Ry. v. Lawrence, 30 F. (2d), 454, 458 (C. C. A. 2nd, 1927) where it was held that the railroad would not, on account of the great expense involved, be ordered to return its shops to their former location pending final decision after reversal of judgment permitting the removal of the shops.

[17]Allen v. Reed, 54 F. (2d) 713, (App. D. C. 1931); Lehman-Durr Co. v. Folmar, 166 Ala. 325, 51 So. 954 (1909); Ure v. Ure, 223 Ill. 454, 79 N. E. 153 (1906); Carson's Adm'r. v. Suggett's Adm'r., 34 Mo. 364 (1864); Heilman v. Frey, 54 N. J. L. 284 (1892); Golde Clothes Shop v. Loew's Buffalo Theatres, 236 N. Y. 465, 141 N. E. 917 (1923); Neff v. Heiner, 163 S. W. 141 (Tex. Civ. App. 1914). In the following cases it was held that a *bona fide* purchaser from a successful party loses, by reversal, the title which he had acquired: MacKenzie v. Engelhard, 266 U. S. 131, 69 L. ed. 205 (1924); Smith v. Huntoon, 134 Ill. 24, 24 N. E. 971 (1890); Hopkins v. Patton, 257 Ill. 346, 100 N. E. 992 (1913); Smith v. Cottrell, 94 Ind. 379 (1883); Dunnington v. Elston, 101 Ind. 373 (1884); Griswold v. Ward, 128 Ind. 389, 27 N. E. 751 (1891); Farmer's Bank of Frankfort v. First Nat'l Bank of Frankfort, 30 Ind. App. 520, 66 N. E. 503 (1902); Hoosier Const. Co. v. Siebert, 63 Ind. App. 594, 144 N. E. 981 (1917); Olson v. Leibpke, 110 Ia. 594, 81 N. W. 801 (1900); Kremer v. Schutz, 82 Kan. 175, 107 Pac. 780 (1910); Clarey v. Marshall's Heirs, 4 Dana 96 (Ky. 1836); Debell v. Foxworthy, 9 B. Mon. 228 (Ky. 1848); Earle v. Crouch, 3 Metc. 455 (Ky. 1861); Hess v. Deppen, 125 Ky. 424, 105 S. W. 362 (1907); Ritson v. Dodge, 33 Mich. 463 (1876); Cook v. French, 96 Mich. 525, 56 N. W. 101 (1893); Lord v. Hawkins, 39 Minn. 73 (1888); Real Estate Savings Inst. v. Collonious, 63 Mo. 290 (1896); Martin v. Abbott, 72 Neb. 89, 100 N. W. 942 (1904); Stuart v. Coleman, 78 Okla. 81, 188 Pac. 1063 (1920); Harle v. Langdon's Heirs, 60 Tex. 555 (1883); Randall v. Snyder, 64 Tex. 350 (1885); Sharp v. Elliott, 70 Tex. 666, 8 S. W. 488 (1888).

See South Fork Canal Co. v. Gordon, 2 Abb. 479, 489, Fed. Cas. No. 13,189 (C. C. 9th, 1868), wherein Mr. Justice Field said: "The defendant . . . is to be restored, by reversal, to all things which he lost by the erroneous judgment or decree;" and Gott v. Powell, 41 Mo. 416, 420 (1867), wherein it was said: "Where a man recovers land in a real action . . . and the judgment is afterwards reversed, so far as he is concerned his title is at an end, and the land or goods must be restored *in specie*—not the value of them but the things themselves."

undoing its own wrong.[18] It seems evident that the paramount purpose is to further the confidence of society in the regularity of judicial administration. This conclusion is supported by the fact that in only one case is there even a dictum to the effect that the merits of the claims of the parties should be considered.[19]

Where the transfer under the original judgment was of possession, the remedy on reversal is restitution of possession of the property *in specie*.[20] This may be obtained by means of an order in the judgment of reversal,[21] by motion in the trial court,[22] by an independent bill for restitution,[23] or by an independent action of ejectment.[24] It is universally held that these remedies are cumulative,[25] and it is said that on the principle—*circuitus est evitandus*—direct relief in the same suit is preferable.[26]

Where the adjudication was of legal title, the title is at an end and a lien will be reinstated;[27] the application of the appellee for

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[18]See Chung v. Laumeister, 83 Cal. 384, 386, 23 Pac. 320 (1890). In Lehman-Durr Co. v. Folmar, 166 Ala. 325, 330, 51 So. 954, 955 (1909) it was said that all that restitution does in this type of case is to put the parties back where they were before the erroneous judgment.

[19]Carroll v. Draughan, 173 Ala. 338, 346, 56 So. 209 (1911). It had been already decided in an independent suit that appellant had no interest in the property. Carroll v. Draughan, 154 Ala. 430, 35 So. 919 (1908).

[20]See Gott v. Powell, 41 Mo. 416, 420 (1867), quoted *supra* note 17.

[21]It appears that this power is in the appellate court if granted by statute. Runyan v. Hale, 10 Ark. 476 (1850); Rudiger v. Coleman, 228 N. Y. 225, 126 N. E. 723 (1920). *Cf.* Golde Clothes Shop Co. v. Loew's Buffalo Theatres, 236 N. Y. 465, 141 N. E. 917 (1923); Carroll v. Draughan, 173 Ala. 338, 340, 56 So. 209 (1911). And it is inherent in that court if not so granted. Reilly v. State, 119 Conn. 217, 175 Atl. 582 (1934); Randall v. Snyder, 64 Tex. 350 (1885).

Restitution in the appellate proceeding is discretionary, and failure to make such an order is not an adjudication adverse to the appellant's right. He may be left to his remedy by an action—*e. g.*, ejectment in case of hardship or uncertainty. See Golde Clothes Shop Co. v. Loew's Buffalo Theatres, *supra*. In Connecticut it is said to be better practice, on reversal on writ of error, to remand the case to the trial court for affirmative relief. See Reilly v. State, *supra*.

[22]Fleeman v. Herren, 3 Eng. 355 (Ark. 1848); Chung v. Laumeister, 83 Cal. 384, 23 Pac. 320 (1890); Lanyon v. Chesney, 209 Mo. 1, 106 S. W. 522 (1907); Heileman v. Frey, 54 N. J. L. 284 (1892); Goepel v. Robinson, 122 App. Div. 26, 106 N. Y. Supp. 990 (1907). This power is inherent in the trial court (Fleeman v. Heren, *supra*) even if the appellate court does not use its power to direct restitution (Goepel v. Robinson, *supra*).

[23]Raun v. Reynolds, 18 Cal. 275 (1861); McCormick v. McLure, 6 Blackf. 466 (Ind. 1843); Carson's Adm'r. v. Suggett's Adm'r. 34 Mo. 364 (1864).

[24]Allen v. Reed, 54 F. (2d) 713 (App. D. C. 1931); Golde Clothes Shop Co. v. Loew's Buffalo Theatres, 236 N. Y. 465, 141 N. E. 917 (1923).

[25]Carroll v. Draughan, 173 Ala. 338, 56 So. 209 (1911) *semble*; Golde Clothes Chop Co. v. Loew's Buffalo Theatres, note 24 *supra;* Goepel v. Robinson, 106 N. Y. Supp. 990, 122 App. Div. 26 (1907).

[26]See Carroll v. Draughan, 173 Ala. 338, 342, 56 So. 209 (1911).

[27]Davis v. Hall, 90 Mo. 659, 3 S. W. 382 (1886) *semble*. If this is impossible, restitution of the loss occasioned by the loss of the lien may be had. MacKenzie v. Engelhard & Sons Co., 266 U. S. 131, 69 L. ed. 205, 45 S. Ct. 68

registration of land will be refused;[28] he will have no defense to a motion for restitution,[29] nor to an independent bill for restitution;[30] he will have neither a cause of action in ejectment[31] nor a defense to an ejectment brought by the appellant;[32] and if restoration of the property in kind is possible he will be liable for restitution of the value[33] or the proceeds thereof.[34] If the appellee had possession of the property between the judgment in his favor and the reversal he will be liable for rents actually received by him,[35] or for the value of rents and profits.[36]

II. Payment of Judgment for a Sum of Money

In this situation the adjudication is not of interests in a particular thing, but of a duty to pay money as substituted reparation

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(1924); Goepel v. Robinson, 122 App. Div. 26, 106 N. Y. Supp. 990 (1907) *semble.*

[28]Eich v. Czervonko, 330 Ill. 455, 161 N. E. 864 (1928).

[29]Reilly v. State, 119 Conn. 217, 175 Atl. 582 (1934); Plaza Farmers v. Tomlinson, 49 P. (2d) 36 (Wash. 1935).

[30]MacKenzie v. Engelhard & Sons Co., 266 U. S. 131, 69 L. ed. 205, 45 S. Ct. 68 (1924); McCormick v. McLure, 6 Blackf. 466 (Ind. 1843); Goepel v. Robinson, 122 App. Div. 26, 106 N. Y. Supp. 990 (1907).

[31]Real Estate Savings Inst. v. Collonious, 63 Mo. 290 (1896) *semble;* Macklin v. Allenberg, 100 Mo. 337, 13 S. W. 350 (1889).

[32]Allen v. Reed, 54 F. (2d) 713 (App. D. C. 1931); Clarey v. Marshall's Heirs, 4 Dana 96 (Ky. 1836) *semble;* Debell v. Foxworthy, 9 B. Mon. 228 (Ky. 1848); Lessee of Taylor v. Boyd, 3 Ohio 338 (1828); Ritson v. Dodge, 33 Mich. 463 (1896).

[33]Mackenzie v. Engelhard, 266 U. S. 131, 69 L. ed. 205, 45 S. Ct. 68 (1924); Asato v. Emirzian, 177 Cal. 493, 171 Pac. 90 (1918). In the Asato case the appellee had judgment for specific performance of a contract to deliver orange trees and, on delivery under the judgment, put them in his land. Before reversal the trees died. He was held to have been in the position of a trustee guilty of misfeasance and liable for restitution of the trees to which appellant was entitled on reversal, the destruction of them not excusing restitution of the value.

[34]Oakland v. Buteau, 219 Cal. 745, 29 P. (2d) 177 (1934); Rudiger v. Coleman, 228 N. Y. 225, 126 N. E. 723 (1920). In both cases restitution in kind was impossible as the land had been taken by condemnation between the judgment and the reversal.

[35]Lehman-Durr Co. v. Folmar, 166 Ala. 325, 51 So. 954 (1909); Raun v. Reynolds, 18 Cal. 275 (1861); Bedell v. Harris, 228 App. Div. 529, 240 N. Y. Supp. 550 (1930); Kremer v. Schutz, 82 Kan. 175, 107 Pac. 780 (1910) *semble*; Hoppas v. Bremer, 119 Kan. 411, 239 Pac. 961 (1925).

[36]Ure v. Ure, 223 Ill. 454, 79 N. E. 153 (1906); Carson's Adm'r. v. Suggett's Adm'r., 34 Mo. 364 (1864); Hurst v. Trust Co., 291 Mo. 54, 236 S. W. 58 (1921); Neff v. Heiner, 163 S. W. 141 (Tex. Civ. App. 1914); Plaza Farmers v. Tomlinson, 49 P. (2d.) 36 (Wash. 1935); Peerless Carbon Black Co. v. Gillespie, 87 W. Va. 441, 105 S. E. 517 (1921). In Lehman-Durr v. Folmar, 266 Ala. 325, 51 So. 954 (1909) it was held that the appellant was entitled to recover the rents received without allowance of compensation for management. In the Peerless case, *supra,* it was held, however, that the appellee was liable for profits with an allowance, in the absence of bad faith or fraud, for expenses of production and of incidental improvements to the premises. In the Plaza Farmers case, *supra,* the appellant was held entitled to restitution of the value of the crop produced on the land and to the United States wheat allotment, less allowance for the reasonable cost of producing the crop.

for the invasion of a right. If payment is made after judgment, whether execution is levied or not,[37] property is transferred under a judgment. It is true that no specific property is transferred by force of the judgment, and it may be for this reason that a somewhat different attitude toward restitution is taken.[38] An example of this difference appears when a court gives restitution *on motion*, as of right, of land transferred under a judgment but denies such relief for the rents, remitting appellant to an action therefor.[39] Further, as above noted, inquiry into the merits of the case is not made when there is a reversal of a judgment transferring property *in specie*, while a number of courts will inquire into the merits before giving restitution of money paid on a judgment. Even where the judgment was void[40] the court of Pennsylvania, examining into the merits and finding that the money paid was owed *ex aequo et bono*, refused to order restitution.[41]

Restitution is due, in a proper case, from any person benefiting directly from the payment made by the appellant. The appellee is, of course, liable as is an assignee of the judgment,[42] and the attorney of the appellee, if he pays himself from the money re-

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[37]In most jurisdictions the right to restitution is based on the theory of duress and it need not be shown that execution was levied or even issued, the theory of the courts being that there is sufficient duress in the power to issue and levy execution. Chambliss v. Hass, 125 Ia. 484, 101 N. W. 152 (1904); Hiler v. Hiler, 35 Ohio St. 645 (1880); Scholey v. Halsey, 72 N. Y. 578 (1878). See especially Warren v. Order of Ry. Conductors of America, 199 Mo. App. 200, 218, 201 S. W. 368 (1918) and *cf.* Cummings v. Noyes, 10 Mass. 433, 435 (1813), wherein it was said that there was no tort nor a promise to repay on reversal, but that the appellant could, by analogy, waive the tort if any and sue in assumpsit.

In Gould v. McFall, 118 Pa. 455, 12 Atl. 336 (1888) it was held that payment of a void—as distinguished from a reversed—judgment in order to avert a sale on execution was voluntary and not recoverable, on the ground that the interest of the appellant needed no protection, as the sale, on account of the complete invalidity of the judgment, would have passed title to no possible purchaser. Compare, however, the preferable doctrine of Simmons v. Simmons, 91 W. Va. 32, 36, 112 S. E. 189 (1922) to the effect that payment under a void decree was made under mistake of fact that there was a decree, while there was not.

[38]It is probable that this difference arises by analogy to the distinction taken between land and unique chattels on the one hand and other property on the other. It is to be noted that the cases ordering specific restitution of chattels have concerned slaves [Carson's Adm'r. v. Suggett's Adm'r., 34 Mo. 364 (1864)] and orange trees [Asato v. Emirzian, 177 Cal. 493, 171 Pac. 90 (1918)], the latter having been delivered on a decree for specific performance.

[39]Lanyon v. Chesney, 209 Mo. 1, 106 S. W. 522 (1907).

[40]A judgment is not void if the court had jurisdiction over the parties and the subject matter, and if the judgment given was within the power of the court. Johnson v. McKinnon, 54 Fla. 221, 45 So. 23 (1907).

[41]Gould v. McFall, 118 Pa. 455, 12 Atl. 336 (1888).

[42]Florence Cotton & Iron Co. v. Louisville Banking Co., 138 Ala. 588, 36 So. 456 (1903).

ceived for his client.[43] In case of a distribution to creditors by order of the court, each is liable for the amount he received.[44]

Restitution, may be had, of course, by the appellant if he is solvent, or by his trustee in bankruptcy.[45] There is some doubt whether the appellant can have restitution if he is insolvent or pecuniarily unable to pay his debts.[46] Where this is the case the interests affecting only the parties cannot be decisive; the interests of other creditors of the appellant must also be considered. Since, as between creditors of equal rank, it is the policy of the law to make an equal distribution in cases of insolvency, no reason can be seen to give priority in this manner to one creditor who has, through the error of the court, money which should be available for a general distribution—unless, of course, the particular creditor involved is entitled to priority, in which case there seems to be no reason why he should not get it in this manner. It appears, however, that the courts have not considered this interest,[47] but have looked at the question as if it concerned solely the parties; and have felt that, as between them, it was proper that the suc-

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[43]Warren v. Order of Ry. Conductors of America, 199 Mo. App. 200, 201 S. W. 386 (1918); Wilmerding v. Fowler, 55 N. Y. 641 (1873); Millfield Realty Co. v. Catena, 257 N. Y. 515, 178 N. E. 775 (1932); Forstman v. Schulting, 108 N. Y. 110, 15 N. E. 366 (1888) (money paid as costs); *cf.* Loewenstein v. Riker, 258 N. Y. 444, 180 N. E. 113 (1932).

If the money is paid to the client and by him to the attorney the latter is not compelled to restore it. Langley v. Warner, 3 N. Y. 327 (1850); Prendergast v. Muns, 59 S. D. 135, 238 N. W. 344 (1931). *Contra*: Johnson v. McKinnon, 54 Fla. 221, 233, 45 So. 23 (1907) (payment to the attorney by order of the court said to be equivalent to payment to the client and by him to the attorney).

[44]*Ex parte* Morris, 9 Wall. 605, 19 L. ed. 799 (U. S. 1870) (judgment void); Baltimore & O. Ry. Co. v. United States, 279 U. S. 781, 73 L. ed. 954, 49 S. Ct. 492 (1929); *In re* Lilyknit Silk Co., 5 F. Supp. 896 (S. D. N. Y. 1933).

[45]*In re* Lilyknit Silk Co., 5 F. Supp. 896 (S. D. N. Y. 1933). Restitution to a garnishee will be ordered on reversal on appeal of the principal defendant [Lewis v. Chic. & N. W. Ry. Co., 97 Wis. 368, 72 N. W. 976 (1897)], and to an intervenor where appellant admits liability to the appeal or to the intervenor [Orke v. McManus, 149 Ia. 685, 129 N. W. 68 (1910)].

[46]The money will be ordered paid into court. Marvin v. Brewster, 56 N. Y. 671 (1874); Rank v. Becker, 13 Serg. & R. 41 (Pa. 1825). Or restitution will not be ordered. Calumet Dock Co. v. Davis, 218 Ill. App. 176 (1921); State v. Horton, 70 Neb. 334, 90 N. W. 434 (1903); Drescher Rothberg Co. v. Landeker, 82 Misc. 441, 143 N. Y. Supp. 1050 (1913). *Contra*: Conover v. Scott, 6 Hals. 400 (N. J. L. 1830).

[47]*Cf.* however, Calumet Dock Co. v. Davis, 218 Ill. App. 176 (1918) and Rank v. Becker, 13 Serg. & R. 41 (Pa. 1825). In the former, the court in discretion refused to order restitution to the appellant's trustee in bankruptcy against a creditor who had been paid on the judgment before bankruptcy, on the ground that the latter was entitled to priority. In the latter case, the money was ordered paid into court where there were a number of junior judgments unsatisfied.

cessful plaintiff at the trial was entitled to certainty that his claim would be paid should he win at another trial.[48]

As is the case where property is transferred *in specie*, money paid on a judgment is recoverable on reversal, by order of the appellate court,[49] by motion in the trial court,[50] by an independent

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[48]In State v. Horton, 70 Neb. 334, 341-42, 97 N. W. 434, 437 (1903) it was said: "A solvent payee should not be compelled to restore to the trustee in bankruptcy of the payor before retrial on the merits . . . for if they do pay over to the trustee in bankruptcy they can get only a fraction of their money if the claim is just." See also Bickett v. Garner, 31 Ohio St. 28, 29 (1876). *Cf.* Drury v. Franke, 247 Ky. 758, 765, 57 S. W. (2d) 969, 972 (1933) and *In re* Walter *et al*, 89 Ala. 237, 239, 7 So. 400, 401 (1889).

[49]The power exists, even in the absence of statutory authority. Eames v. Stevens, 26 N. H. 117, 124 (1852); Coker v. Rickey, 108 Ore. 479, 219 Pac. 638 (1923); Whitesell v. Peck, 176 Pa. 170, 35 Atl. 45 (1894). It may be exercised even if the judgment below was void for want of jurisdiction. O'Reilly v. Henson, 97 Mo. App. 491, 71 S. W. 109 (1903); Hathaway v. McConkie, 85 Utah 21, 38 P. (2d) 300 (1934). *Contra*: Means v. Remare, 34 Md. 333 (1871); *Ex parte* Morris, 9 Wall. 605, 19 L. ed. 799 (U. S. 1870) *semble*.

[50]Baltimore & O. Ry. Co. v. United States, 279 U. S. 781, 73 L. ed. 954, 49 S. Ct. 492 (1929); *In re* Walter *et al*, 89 Ala. 237, 7 So. 400 (1889); Kaiser v. Barron, 153 Cal. 474, 95 Pac. 879 (1908); Hay v. Bennett, 153 Ill. 271, 38 N. E. 645 (1894); Calumet Dock Co. v. Davis, 218 Ill. App. 176 (1921); Orke v. McManus, 149 Ia. 685, 129 N. W. 68 (1910); Drury v. Franke, 247 Ky. 758, 57 S. W. (2d) 969 (1933); State v. Sevier, 73 S. W. (2d) 361 (Mo. 1934); Warren v. Order of Ry. Conductors of America, 199 Mo. App. 200, 201 S. W. 386 (1918); Anderson v. Border, 87 Mont. 4, 285 Pac. 174 (1930); Nepstad v. E. Chic. Oil Ass'n., 96 Mont. 183, 29 P. (2d) 643 (1934); Hier v. Annheuser Busch Ass'n., 60 Neb. 321, 83 N. W. 77 (1900); State v. Horton, 70 Neb. 334, 90 N. W. 434 (1903); Conover v. Scott, 6 Hals. 400 (N. J. L. 1830); Drescher Rothberg Co. v. Landeker, 82 Misc. 441, 143 N. Y. Supp. 1050 (1913); Lytle v. Lytle, 94 N. C. 522 (1886); Coker v. Rickey, 108 Ore. 479, 217 Pac. 638 (1923); Kirk v. Eaton, 10 Serg. & R. 103 (Pa. 1822); Rank v. Becker, 13 Serg. & R., 41 (Pa. 1825); Fleming v. Riddick, 5 Gratt. 272 (Va. 1848); Lewis v. Chic. & N. W. Ry. Co., 97 Wis. 368, 72 N. W. 976 (1897); see Anon., 2 Salk. 588 (1706).

Where more than one person is to make restitution, this power arises, it was said in Baltimore & O. Ry. Co. v. United States, 279 U. S. 781, 786, from the fact that treating each claim as the basis of a separate cause of action made many troublesome suits, and an order can be made that the appellants are entitled to restitution and the case referred to a master. The power is inherent in the bankruptcy court, since it is a court of equity, and "the absence of a provision for restitution in the Bankruptcy Act and in the rules of court is therefore of no significance." See *In re* Lilyknit Silk Co., 5 F. Supp. 896, 897 (S. D. N. Y. 1933). The appellate court will issue mandamus to the trial court if it refuses to proceed on the motion for restitution. *In re* Walter *et al*, *supra;* State v. Dickinson, 63 Neb. 869, 89 N. W. 431 (1902).

The trial court will direct restitution even though the judgment was reversed on the ground that it did not have jurisdiction. *Ex parte* Morris, 9 Wall. 605, 19 L. ed. 799 (U. S. 1870); Northwestern Fuel Co. v. Brock, 139 U. S. 216, 11 S. Ct. 523 (1890); Means v. Remare, 34 Md. 333 (1871); Texas Land & Irrigation Co. v. Sanders, 101 Tex. 616, 111 S. W. 648 (1908); Simmons v. Simmons, 91 W. Va. 32, 112 S. E. 189 (1922).

bill for restitution,[51] or by an independent action of assumpsit.[52] In this situation also, the remedies are cumulative.[53]

Although, as here shown, the general rule is that the successful appellant is entitled to restitution of the money which he paid in satisfaction of a later reversed judgment, there is, as suggested above, some question whether the court will consider the merits of the appellee's claim in the proceedings for restitution. There is a sharp conflict among the courts on this question. The courts of some states see only an absolute right of the appellant to have restitution.[54] Others see undue difficulties for the court if it must investigate the merits of a case before ordering restitution or allowing action by the successful appellant.[55] Others see an injury

[51]Crocker v. Clements, 23 Ala. 296 (1853); Zimmerman v. National Bank of Winterset, 56 Ia. 133, 8 N. W. 807 (1881); Hays v. Griffith, 85 Ky. 375, 3 S. W. 431 (1887) *semble.*

[52]Bank of U. S. v. Bank of Wash., 6 Pet. 8, 8 L. ed. 299 (1832); Florence Cotton & Iron Co. v. Louisville Banking Co., 138 Ala. 588, 36 So. 456 (1903); Green v. Stone, 1 Har. & J. 405 (Md. 1803); Teasdale v. Stoller, 133 Mo. 645, 34 S. W. 873 (1895); Nepstad v. E. Chic. Oil Ass'n., 96 Mont. 183, 29 P. (2d) 643 (1934); Hier v. Annheuser Busch Ass'n., 60 Neb. 321, 83 N. W. 77 (1900); Scholey v. Halsey, 72 N. Y. 578 (1878); Haebler v. Myers, 132 N. Y. 363, 30 N. E. 963 (1892); Bickett v. Garner, 31 Ohio St. 28 (1876); Hiler v. Hiler, 35 Ohio St. 645 (1880).

[53]*Cf.* Bank of U. S. v. Bank of Washington, 6 Pet. 8, 8 L. ed. 299 (1832); Hay v. Bennett, 153 Ill. 271, 38 N. E. 645 (1894); State v. Sevier, 73 S. W. (2d) 361, (Mo. 1934); Nepstad v. E. Chic. Oil Ass'n., 96 Mont. 183, 29 P. (2d) 643 (1934); Drescher Rothberg Co. v. Landeker, 82 Misc. 441, 143 N. Y. Supp. 1050 (1913); Fleming v. Riddick, 5 Gratt. 272 (Va. 1848); Simmons v. Simmons, 91 W. Va. 32, 112 S. E. 189 (1922).

Where a judgment in assumpsit is reversed for a matter of form not going to the entire cause of action and the plaintiff brings a new suit for the same cause of action, the defendant may not plead payment of the first judgment in bar of the second suit, but his payment may be set off against the second judgment. A mathematical balance may be struck between the payment on the first judgment and the second verdict, and an appropriate judgment given in the second suit. Close v. Stuart, 4 Wend. 95 (N. Y. 1829).

[54]See Drury v. Franke, 247 Ky. 758, 765, 57 S. W .(2d) 969 (1933); Hier v. Annheuser Busch Ass'n., 60 Neb. 320, 321, 83 N. W. 77 (1900); Lytle v. Lytle, 94 N. C. 522, 525 (1886); Coker v. Rickey, 108 Ore. 479, 483, 219 Pac. 638 (1923); Prendegast v. Muns, 59 S. D. 135, 142, 238 N. W. 344 (1931); Fleming v. Riddick, 5 Gratt. 272, 280 (Va. 1848). It was said in Fleming v. Riddick, *loc. cit. supra*: "A judgment or decree when reversed is a mere nullity and the party aggrieved has a right to be restored to what he has lost by reason of such erroneous decision." Harris, J., speaking for the court in Coker v. Rickey, *supra*, said that the law imposes upon the appellee an obligation to make restitution of the moneys received by him. The same attitude appears in Prendergast v. Muns, *supra*. The Nebraska court, in Hier v. Annheuser Busch Ass'n., *supra*, found a conclusive presumption of a promise to make restitution. See also the quotations from Drury v. Franke and *In re* Walter *et al.* in note 48, *supra*.

[55]See Bickett v. Garner, 31 Ohio St. 28, 30 (1876); Rank v. Becker, 13 Serg. & R. 41, 43 (Pa. 1825). In Bickett v. Garner, it was said: " . . . to suspend restitution on this ground would involve the court in endless difficulties. It might be alleged in every case in which a judgment is reversed and remanded for further proceedings and the court might be compelled in every instance to investigate the merits of the case on a motion for restitution."

to the honor and dignity of the court if there be left unchanged any result caused by the error of the court.[56] Others seem to look on the matter as settled by methods of procedure.[57]

The courts of other jurisdictions regard the existence of the right to restitution as resting upon the equities between the parties whether the proceeding to obtain restitution is by bill for restitution,[58] by motion in the case,[59] or by an action of assumpsit.[60] There seems to be no way of reconciling the decisions in these two groups of cases, nor does there appear to be any explanation on historical or geographical grounds.[61] In the group which deny in-

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[56]See State v. Horton, 63 Neb. 34, 42, 88 N. W. 146, 149 (1901); Lytle v. Lytle, 94 N. C. 522, 525 (1886).

In State v. Horton it was said: "When the defendant is restored . . . then, and not until then, will the court be in condition in which it can honorably to itself pass upon the further rights of the parties;" and in Lytle v. Lytle, "The law will not allow its process to work injury to a party against whom it goes by improvidence, mistake or abuse. This is alike due to the integrity of the court and to the party asking relief." Note also Conover v. Scott, 6 Hals. 400 (N. J. L. 1830) (no set-off allowed appellee against appellant's right to restitution even where the latter was insolvent).

[57]Conover v. Scott, 6 Hals. 400 (N. J. L. 1830), where the decision was based in part upon the idea that execution will issue upon reversal and that there would have been no chance to set up equities if that procedure had been chosen; and Anon., 2 Salk. 588 (Eng. Rep. 1706), upon a dictum found wherein the doctrine seems to rest.

[58]Carroll v. Draughan, 173 Ala. 338, 56 So. 209 (1911).

[59]Sanger Lbr. Co. v. Western Lbr. Exch., 11 F. (2d) 489 (1926); Warren v. Order of Ry. Conductors of America, 199 Mo. App. 200, 201 S. W. 386 (1918). In the Sanger case, the defendant in the original action was allowed to retain, on plaintiff's motion for restitution, money which he had received on counterclaim to the extent of advances made by him on a contract which was not performed.

[60]Hays v. Griffith, 85 Ky. 375, 3 S. W. 431 (1887); Green v. Stone, 1 Har. & J. 405 (Md. 1803); Teasdale v. Stoller, 133 Mo. 645, 34 S. W. 873 (1895); Scholey v. Halsey, 72 N. Y. 578 (1878); Gould v. McFall, 118 Pa. 455, 12 Atl. 336 (1888); see Raun v. Reynolds, 18 Cal. 275, 290 (1861). These cases represent the doctrine that where there is a reversal the situation is as if there had been no judgment and that the plaintiff, successful in the original action, is entitled to show that the money was due him *ex aequo et bono*; and that, even if paid to him under duress, he is entitled to retain it. The reversals were for errors not going to the merits of the causes of action—*e.g.*, in Green v. Stone, *supra*, the defendant had confessed judgment, but the plaintiff had failed to file a declaration; and in Gould v. McFall, *supra*, the plaintiff took judgment by default against a *feme covert*, failing to prove that his claim was for "necessaries."

[61]The decisions in Pennsylvania and Alabama, however, may offer evidence that there is a modern tendency to look less at formalities and at absolute rights, and to consider the equities between the parties.

In Pennsylvania, the case of Rank v. Becker, 13 Serg. & R. 41 (Pa. 1825) is to be compared with Gould v. McFall, 118 Pa. 455, 12 Atl. 336 (1888). In the earlier, the court refused to consider the merits between the parties on motion for restitution, because, according to Tilgham, C. J., this "would involve the court in endless difficulties." Rank v. Becker, *supra*. (See note 55, *supra*). More recently, the court considered, in an action of assumpsit for restitution, that the plaintiff in the original action could have proved that his claim was for "necessaries" (See note 60, *supra*), and for that reason

quiry into the merits are found cases from 1825 to 1933. The states in which this doctrine holds include Kentucky, New Jersey, Nebraska, North Carolina, Ohio, Oregon, South Dakota and Virginia. In the group which represent willingness to inquire into the merits are found cases from 1803 to 1926. These decisions were made in the courts of Alabama, Missouri, New York and California and in the Federal Courts. It is possible at this point, then, only to take note of the fact that there is a conflict.[62]

III. Transfer of Property by Sale on Execution[63]

If the defendant in the original action fails to pay the amount of the judgment, either through unwillingness or inability, and the plaintiff proceeds to enforce his judgment by sale of the property of defendant on execution[64] that property may be purchased at the sale by a stranger to the action, by the plaintiff, by the plaintiff's

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held that the plaintiff in the second action, defendant in the first, was not entitled to judgment as the defendant in that action was entitled, *ex aequo et bono*, to retain the money paid. There are differences between the cases, but it does not seem that the distinctions represent a sufficient basis for the difference in result. In the first place, the earlier case was on motion for restitution and the later on an independent action of assumpsit. Restitution was granted in Missouri on both forms of procedure [Warren v. Order of Ry. Conductors of America, 199 Mo. App. 200, 201 S. W. 386 (1913) (motion for restitution); Teasdale v. Stoller, 133 Mo. 645, 34 S. W. 873 (1895) (independent action of assumpsit)]. In the second place, the earlier case was reversed for error and the later was a case of a void judgment. In Simmons v. Simmons, 91 W. Va. 32, 36, 112 S. E. 189 (1922) it was said that payment on a void judgment was made under mistake of fact that there was a judgment when in fact there was not, and, in Fleming v. Riddick, 5 Gratt. 272, 280 (Va. 1848): "A judgment when reversed is a mere nullity."

In Alabama the history of the doctrine is longer and more complete. In the early case of Duncan v. Ware's Ex'rs., 5 Stew. & P. 119 (Ala. 1833) and in Crocker v. Clements, 23 Ala. 296 (1853) it was held that restitution could not be had by the appellant if he justly owed the debt. In *In re* Walter *et al.*, 89 Ala. 237, 7 So. 400 (1889) the court felt no doubt of the absolute right to restitution and the absolute correlative duty to restore, "wholly regardless of considerations looking to the final equities of the parties." (89 Ala. 237, 239, 7 So. 400, 401. See also the quotation from this case in note 48, *supra*). In 1903, in Florence Cotton & Iron Co. v. Louisville Banking Co., 138 Ala. 588, 36 So. 456 (1903), the court criticised the Crocker case, *supra*, and explicitly followed *In re* Walter *et al.*, *supra*. Then, in 1911 in Carroll v. Draughan, 173 Ala. 338, 56 So. 209 (1911), the court, remarking that the Crocker case had been criticised but not overruled in the Florence case, expressly disapproved and overruled *In re* Walter *et al.*, and approved the rule of the Crocker case. It seems that only a modern tendency suggested in this note can account for the latest result, as the procedural differences—*In re* Walter *et al.* and the Florence case were in assumpsit, and the Crocker and Carroll cases, bills for restitution—do not support any difference in result. (See notes 51 and 52, *supra*).

[62]The question of selection of the preferable rule will be discussed later, see p. 183 of this paper.

[63]It must be understood that "sale on execution" includes sale by a master on a decree in equity.

[64]The plaintiff may rightfully enforce his judgment by sale on execution in the absence of a supersedeas (See note 75, *infra*).

attorney, by an assignee of the judgment or by the defendant. On reversal the defendant-appellant may seek restitution of the property *in specie,* or he may seek restitution of the proceeds of the sale or of the value of the property sold. Since the interests to be weighed are different in each of the possible situations it will be convenient to consider each situation separately.

(*A*) *Restitution* in specie *against a stranger to the action*

If the property of the defendant is bought at execution sale by a stranger to the action it is universally held that his title is indefeasible[65] whether the reversal is had before he has perfected his legal title by obtaining a sheriff's deed[66] or thereafter. It appears that the necessity for this result is seen by various courts to arise from the need of protecting various interests. The earliest opinion appears in 1578 in Dyer's Reports[67] where it was held that on reversal after sale on *fieri facias* the appellant was not entitled to restitution *in specie* "because (his property) was legally sold

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[65]Voorhees v. Jackson, 10 Pet. 449, 9 L. ed. 490 (U. S. 1836); Phillips v. Benson, 85 Ala. 416, 5 So. 78 (1888); Estes v. Booth, 20 Ark. 583 (1859); Farmer v. Rogers, 10 Cal. 335 (1858); Ponder v. Moseley, 2 Fla. 207 (1867); Fergus v. Woodworth, 44 Ill. 374 (1867); Lambert v. Livingston, 131 Ill. 161, 23 N. E. 352 (1890); Frakes v. Brown, 2 Blackf. 295 (Ind. 1830); Evans v. Kahr, 60 Kan. 719, 57 Pac. 950 (1899); Crume v. Sherman, 186 Ky. 376, 215 S. W. 196 (1919); Stinson v. Ross, 51 Me. 556 (1863); Barney v. Patterson, 6 Har. & J. 182 (Md. 1823); Gowen v. Conlow, 51 Minn. 213, 53 N. W. 365 (1892); Natchez Ins. Co. v. Helm, 13 Smed. & M. 182 (Miss. 1849); Shields v. Powers, 29 Mo. 315 (1860); Sidwell v. Kaster, 289 Mo. 174, 232 S. W. 1005 (1921); McAusland v. Pundt, 1 Neb. 211 (1871); Manfull v. Graham, 55 Neb. 645, 76 N. W. 19 (1898); Gay v. Smith, 38 N. H. 171 (1859); Woodcock v. Bennett, 1 Cow. 711 (N. Y. 1823); Wood v. Jackson, 18 Wend. 107 (N. Y. 1837); Clark v. Smith, 57 App. Div. 524, 68 N. Y. Supp. 39 (1901); Pettis v. Johnston, 78 Okla. 277, 190 Pac. 681 (1920); Hunter v. Ruff, 47 S. C. 525, 25 S. E. 65 (1896); Campbell v. M'Irwin, 4 Hayw. 60 (Tenn. 1817); Moseley v. Gainer, 10 Tex. 393 (1853). See South Fork Canal Co. v. Gordon, 2 Abb. 479, 487-89, Fed. Cas. No. 13,189 (C. C. 9th, 1868); McCracken v. Paul, 65 Ark. 553, 556, 47 S. W. 854 (1898); Johnson v. McKinnon, 54 Fla. 221, 232, 45 So. 23 (1907); O'Brien v. Harrison, 59 Ia. 686, 689, 12 N. W. 256 (1882); Kennedy v. Duncklee, 1 Gray 65, 67 (Mass. 1854); Glaze v. Johnson, 27 Tex. Civ. App. 116, 65 S. W. 662, 664 (1901); Singly v. Warren, 18 Wash. 434, 437, 51 Pac. 1066 (1898); Corwith v. The State Bank of Wis., 18 Wis. 560, 565 (1864).

Statutes providing that in the event of reversal the title of the purchaser shall not be affected, but that restitution shall be made of the money for which the land sold, are held to be declaratory of the common law. McGuire v. Ely, Wright 520 (Ohio 1834) (29 Ohio L. 107, § 22); Kazebeer v. Nunamaker, 82 Neb. 732, 118 N. W. 646 (1908) (NEB. CODE § 508); Dunfee v. Childs, 45 W. Va. 155, 30 S. E. 102 (1898) [W. VA. CODE (1891) c. 132, § 8]. In Pennsylvania, Act of 1705, 1 Sm. L. 57, providing that, on reversal, the land shall not be restored but there shall be restitution only of the money or price for which such lands are sold, protects purchasing strangers. *A fortiori,* Lengert v. Chaninel, 208 Pa. 299, 57 Atl. 561 (1904) (holding that the statute protects party purchasers).

[66]Phillips v. Benson, 85 Ala. 416, 5 So. 78 (1888); Hammond v. The People, 178 Ill. 503, 53 N. E. 308 (1899); McGuire v. Ely, Wright 520 (Ohio 1834); Lambert v. Livingston, 131 Ill. 161, 23 N. E. 352 (1890).

[67]Anon., Dyer 363 (K. B. 1578).

through the default of the party himself."[68] Positive reasoning based on the necessity for certainty in legal procedure and upon the right of the plaintiff to realize on his judgment is first found in 1609 in *Manning's Case*.[69] The decision was founded upon the right of the sheriff to sell on a *fieri facias*, and upon a realization that executions would be of no value to plaintiffs if purchasers were not protected.[70] In 1612 in *Goodyer v. Junce*, as reported in Yelverton's Reports,[71] there appears a combination of the reasoning of the case in Dyer's Reports and the second ground in *Manning's Case*. In the same case, as reported *sub. nom. Goodyere v. Ince* in Croke's Reports,[72] appears the first reason given in *Manning's Case*. The interest of the defendant is recognized in some of the cases, where it is noted that, if bidding at the sales is discouraged by failure to protect third party purchasers, he will not have a proper payment credited upon his debt in cases in which there is no appellate procedure or where such procedure results in favor of the appellee. This is put most strongly in *Wood v. Jackson*,[73] where it was said:

> "The law is not guilty of the absurdity of declaring that the defendant's property shall be sold to satisfy the

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[68]The same attitude is seen in Peck v. McLean, 36 Minn. 228, 231 (1886) and Gay v. Smith, 38 N. H. 171, 178 (1859).

[69]8 Co. 94b, 96a, 97a (K. B. 1609). It was here said: "By force of [*fieri facias*] the Sheriff sold the term . . . as well he might, and the vendee paid money to the value of it. And if the sale of the term should be avoided the vendee would lose his term and his money, too, and . . . none would buy of the Sheriff goods or chattels in such cases, and so execution of judgments (which is the life of the law in such case) would not be done."

[70]In Sneed v. Reardon, 1 A. K. Marsh. 217, 218 (Ky. 1818) it was said: "As the judgment and execution confer a sufficient authority to the sheriff to sell, it follows that a sale and conveyance by him must necessarily transfer to the purchaser the defendant's title." In a later case in the same state, Hess v. Deppen, 125 Ky. 424, 430, 101 S. W. 362, 363 (1907), the court said: "The rule is elementary that in a judicial sale the court is the vendor, and that in selling it acts as the agent of the defendant, compelling him to do what it determines he ought to have done . . . If the court makes a mistake it is a mistake of the law and not of the plaintiff."

See also South Fork Canal Co. v. Gordon, 2 Abb. 479, 487, Fed. Cas. No. 13,189 (C. C. 9th, 1868); Fergus v. Woodworth, 44 Ill. 374, 384 (1867); Barney v. Patterson, 6 Har. & J. 182, 204 (Md. 1823). In Fergus v. Woodworth, *supra*, the emphasis is put upon the protection of the interest of the third party purchaser—"The law does not require a purchaser to inspect the record and see that it is free from error. He has only to see that the court has jurisdiction, and there is such a judgment or decree unreversed as authorizes the sale."

[71]Yelv. 179 (K. B. 1612). "[The purchaser's title is good] according to the opinion in 20 Eliz. [Anon., Dyer 363; see note 67 *supra*] for it is the party's folly that he does not pay the judgment; and if such sales should be avoided none would buy goods of the sheriff, whereby many executions would fail."

[72]Cro. Jac. 246 (K. B. 1612). The reason here given was that the *fieri facias* gives authority to the sheriff to sell, and the third party comes into title by act of law.

[73]18 Wend. 107, 124 (N. Y. 1837).

> plaintiff's debt, yet the purchaser shall not acquire the defendant's title to the property purchased. A system of jurisprudence would stand self degraded, which should be so grossly inconsistent, insincere and mischievously hypocritical in luring and deceiving purchasers, to the prejudice of defendants and the sacrifice of their property."[74]

While this recognition of the defendant's interest does appear occasionally, it is evident that the claim of the plaintiff to the fruits of his judgment is that most favorably regarded by the courts. This appears from the frequent references to the fact that the opportunity given to defendants to protect their property by the filing of supersedeas bond is ample protection and that a defendant who fails to take opportunity can hardly complain if the other party proceeds to enforce his judgment.[75]

The absolute protection given to strangers to the cause of action who may purchase at the execution sale is extended in general to all persons who are not parties to the suit nor privy thereto. The class of persons so protected is expressed by the courts as including purchasers in good faith for value and without notice. In this connection this phrase is a mere cliche'; for good faith is lacking only if the purchaser is in privity with a party, or is closely connected personally with a party.[76] Thus, an assignor for the benefit of creditors is sufficiently in privity with his assignee that his

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[74]This interest was recognized in Reynolds v. Harris, 14 Cal. 667, 681 (1860) and Evans v. Kahr, 60 Kan. 719, 724, 57 Pac. 950, 952 (1899), wherein it was noted that the highest price after competition would not be had if purchasers were made timid by insecurity of title. The existence of the claim was recognized in South Fork Canal Co. v. Gordon, 2 Abb. 479, 489, Fed. Cas. No. 13,189 (C. C. 9th, 1868), but was denied as a reason for the doctrine. It was there said: "Strangers are protected, not because a contrary rule would discourage bidding, but because they have a right to rely on the validity of the judgment, and to invoke its protection . . . for the rights they have acquired thereby. That the rule has also the effect of encouraging bidding is evidence of its wisdom, but it is not the reason for its establishment."

[75]Peck v. McLean, 36 Minn. 228, 231 (1886). The same approach appears in those cases which mention the failure of the defendant to take advantage of the existence of statutes providing for supersedeas on the filing of a bond. Farmer v. Rogers, 10 Cal. 335 (1858); Evans v. Kahr, 60 Kan. 719, 57 Pac. 950 (1899); Shields v. Powers, 29 Mo. 315 (1860); Sidwell v. Kaster, 289 Mo. 174, 232 S. W. 1005 (1921); McAusland v. Pundt, 1 Neb. 211 (1871); Manfull v. Graham, 55 Neb. 645, 76 N. W. 19 (1898); McGuire v. Ely, Wright 520 (Ohio 1834); State Bank v. Ladd, 65 Okla. 14, 162 Pac. 684 (1917); Kramer v. Wellendorf, 8 Sadler 1, 10 Atl. 392 (Pa. 1887); Glaze v. Johnson, 27 Tex. Civ. App. 116, 65 S. W. 662 (1901); Singly v. Warren, 18 Wash. 434, 51 Pac. 1066 (1898).

[76]There is a suggestion in Natchez Ins. Co. v. Helm, 13 Smed. & M. 182, 187 (Miss. 1849), that a purchaser who paid the amount of his bid directly to the plaintiff, knowing that the latter was insolvent, might not be in good faith. Where it was found in an independent suit that the purchaser was not *bona fide* his title failed. Pauley v. Knouse, 109 Neb. 716, 192 N. W. 195 (1923).

title, obtained by purchase at judicial sale, will fail upon reversal of a decree in favor of the latter.[77] Likewise, a guardian who purchases his wards' property at a partition sale has a title voidable upon reversal;[78] as does the mother of the plaintiff, an unmarried daughter, where the mother and daughter lived together and held their property in common.[79] Notice of the filing of appellate proceedings is not notice to affect strangers,[80] who are protected up to the time of reversal.

There is some disagreement among the courts as to the protection accorded to a stranger who purchases at execution sale under a judgment which is void,[81] as distinguished from a judgment which is reversed for error. Most of the courts which have considered the question have reached the conclusion that a void judgment "is but a solemn fraud, not so much a judicial sentence as an arbitrary sovereign edict, having none of the elements of a judicial proceeding,"[82] and that all the titles acquired at a sale under it fall with it.[83] If, however, debts of the appellant have been paid with the money realized at the sale or if the purchaser, while believing in good faith that he was the owner of the property, has added permanent improvements, he is entitled to be paid the money used to pay debts and the value of improvements.[84] A few courts protect

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[77]Welcker v. Staples, 88 Tenn. 49, 12 S. W. 340 (1889).

[78]Kazebeer v. Nunamaker, 82 Neb. 738, 118 N. W. 646 (1908).

[79]Cottle v. Simon, 153 N. Y. 403, 47 N. E. 815 (1897).

[80]Fergus v. Woodworth, 44 Ill. 374 (1867); *cf.* Glaze v. Johnson, 27 Tex. Civ. App. 116, 65 S. W. 662 (1901), holding that a stranger, who bought at execution sale within the time allowed by statute for motion for new trial when service was by publication only, bought *pendente lite*. It was there said (65 S. W. at 664): "He must have known that he could not have bought $4000 worth of property for $260, except on the theory that he was buying a defeasible right." *Cf.* also Coates v. O'Connor, 102 Neb. 602, 168 N. W. 102, 169 N. W. 239 (1918), where it was said, (168 N. W. at 103), that knowledge that the proceeding would be contested and "the utmost haste . . . to get in out of the possible raid before the storm arrived" might show lack of good faith; and, further (169 N. W. at 239): "The purchaser of real estate at a sale during the term at which judgment by default was entered would not ordinarily be presumed to be protected by the statute if the default was set aside, but would be required to show his good faith in the purchase."

[81]See note 40, *supra*.

[82]See Wise v. Miller, 215 Ala. 660, 663, 111 So. 913 (1927).

[83]Galpin v. Page, 18 Wall. 350, 21 L. ed. 959 (U. S. 1873); Wise v. Miller, 215 Ala. 660, 111 So. 913 (1927); Hutson v. Wood, 236 Ill. 376, 105 N. E. 343 (1914); Bradley v. Brown, 86 Ia. 359, 53 N. W. 268 (1892); Griggsly v. Barr, 14 Bush 330 (Ky. 1878); Webb v. Sherman, 178 Ky. 152, 198 S. W. 736 (1917); Adle v. Anty, 5 La. Ann. 631 (1850); Kennedy v. Duncklee, 1 Gray 65 (Mass. 1854); Cole v. Johnson, 53 Miss. 94 (1876); McCracken v. Flanagan, 127 N. Y. 493, 28 N. E. 385 (1891), 141 N. Y. 174, 36 N. E. 10 (1894).

[84]Ejectment by the heir will be enjoined unless he pays to the purchaser the amount of money used to pay decedent defendant's debts plus the value of permanent improvements less the rental value. Cole v. Johnson, 53 Miss. 94 (1876). The defendant in the original action cannot maintain a bill to set aside a foreclosure sale unless he pays to the purchaser the amount paid to the

an innocent stranger where the record was fair on its face, on the theory that the contrary rule weighs unduly heavily on the stranger and that both plaintiff and defendant will suffer if third party purchasers must take the chance, as they will then pay only a small price, discounting the risk;[85] or upon the more formal ground that the stranger is protected by the policy favoring judgments as against extrinsic evidence.[86]

(*B*) *Restitution* in specie *against others than strangers*

When the purchase at the execution sale is made by some person whom the court considers to be a moving party in the judgment or the sale, the nearly universal rule is otherwise. In such event the property can be recovered from the purchaser *in specie*.[87] This class of persons includes parties,[88] their attorneys[89] and assignees of the judgment,[90] or of the officer's certificate of sale.[91]

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mortgagee, plus taxes and assessments paid by the purchaser plus the value of any permanent improvements. Hutson v. Wood, 236 Ill. 376, 105 N. E. 343 (1914).

[85]See Smoot v. Judd, 184 Mo. 508, 540, 83 S. W. 481 (1902).

[86]See Pettis v. Johnston, 78 Okla. 277, 283, 190 Pac. 681 (1920); Hunter v. Ruff, 47 S. C. 525, 536, 25 S. E. 65 (1896). The court approved this principle in Wise v. Miller, 215 Ala. 660, 663, 111 So. 913, 915 (1927), but said that this policy supposes that the party had an opportunity to be heard, "for otherwise there has been no litigation that would invoke the policy." It was said also that it is more in consonance with justice that the purchaser who was misled by the return should be remitted to an action against the falsely returning officer than that the appellant should be.

[87]Hays v. Sound Timber Co., 261 Fed. 571 (1919); Marks v. Cowles, 61 Ala. 299 (1878); Lehman-Durr Co. v. Folmar, 154 Ala. 480, 45 So. 289 (1907); Cowdery v. London Bank, 139 Cal. 298, 73 Pac. 196 (1903); Russell v. Mohr-Weil Lbr. Co., 114 Ga. 753, 40 S. E. 709 (1901); Hays v. Cassell, 70 Ill. 669 (1873); Schoonover v. Osborne, 117 Ia. 427, 90 N. W. 844 (1902); Hubbard v. Ogden, 22 Kan. 671 (1871); Gott v. Powell, 41 Mo. 416 (1867); Mullin v. Atherton, 61 N. H. 20 (1881); Welcker v. Staples, 88 Tenn. 49, 125 N. W. 340 (1889); Glaze v. Johnson, 65 S. W. 662 (Tex. Civ. App. 1901); Benney v. Clein, 15 Wash. 581, 46 Pac. 1037 (1896); Corwith v. The State Bank of Wis., 15 Wis. 289 (1862); *cf.* Di Nola v. Allison, 143 Cal. 106, 76 Pac. 976 (1904); O'brien v. Harrison, 59 Ia. 686, 12 N. W. 256 (1882); Jackson v. Cadwell, 1 Cow. 622 (N. Y. 1824); Hening v. Punnett, 4 Daly 543 (N. Y. 1873); Adams & Wickes v. Odom, 74 Tex. 206, 12 S. W. 34 (1889); see Galpin v. Page, 18 Wall. 350, 373, 21 L. ed. 959 (U. S. 1873); McCracken v. Paul, 65 Ark. 553, 556, 47 S. W. 854 (1898); Johnson v. McKinnon, 54 Fla. 221, 232, 45 So. 23 (1907); Thompson v. Davis, 297 Ill. 11, 15, 130 N. E. 455 (1921).

[88]See notes 77-79, *supra*.

[89]Hays v. Cassell, 70 Ill. 669 (1873); Mullin v. Atherton, 61 N. H. 20 (1881); see Galpin v. Page, 18 Wall. 350, 373, 21 L. ed. 959 (U. S. 1873); Johnson v. McKinnon, 54 Fla. 221, 232, 45 So. 23 (1907); Phillips v. Benson, 85 Ala. 416, 5 So. 78 (1888); Twogood v. Franklin, 27 Ia. 239, 244 (1869); Crume v. Sherman, 185 Ky. 376, 386, 215 S. W. 196 (1919).

[90]Reynolds v. Harris, 14 Cal. 667 (1860); McJilton v. Love, 13 Ill. 486 (1888); Winterson v. Hitchings, 10 Misc. 396, 31 N. Y. Supp. 127 (1894).

[91]McDonald v. Mobile Ins. Co., 65 Ala. 358 (1880); Reynolds v. Harris, 14 Cal. 667 (1860); Guiteau v. Wisely, 47 Ill. 433 (1868); Roberts v. Clelland, 82 Ill. 538 (1876); Singly v. Warren, 18 Wash. 434, 51 Pac. 1066 (1898).

The difference between the rule with regard to third party purchasers and these others appears to have had its foundation in the practice of setting off the defendant's property by *elegit* or extent. This difference was first recognized in *Goodyer v. Junce*,[92] and continued to be recognized in those states in which this type of procedure was employed.[93] At about the same time, in this country, it was seen that the position of a purchasing plaintiff and that of a plaintiff under *elegit* amounted to the same thing.[94] He had the defendant's land and, since his right to collect under his judgment had been reversed, he had really parted with no money as his payment to the selling officer had been repaid to him or he had credited the amount of his bid on his judgment.[95]

In five states, party purchasers have been protected in the same manner as strangers—Kentucky, Louisiana, Nebraska, North Carolina and Pennsylvania—the rule having been approved in dictum by Mr. Justice Field in *South Fork Canal Co. v. Gordon*.[96] In North Carolina the reason given is based upon the nature of the *fieri facias*: "When a judgment is reversed, the defendant is to be restored what he lost by the writ as it was awarded. In a *fieri facias* he loses the money, because the sheriff is commanded to make the money out of defendant's property."[97] In Kentucky, in the early case of *Sneed v. Reardon*,[98] the argument was upon the basis of the authority of the sheriff to sell.[99] A few years later the court in that state attempted to justify its rule upon a more reasonable basis, saying, in *Parker's Heirs v. Anderson's Heirs*,[100] that there was the same reason for protecting the interest acquired by a party as that of a stranger. Beginning with the case of *Hess v. Deppen*[101] Kentucky came into line with the majority to the extent of holding that the appellant was entitled to recover his prop-

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[92]Yelv. 179, *sub. nom.* Goodyere v. Ince, Cro. Jac. 246 (K. B. 1612).

[93]Bryant v. Fairfield, 51 Me. 149 (1863); Gato v. Christian, 112 Me. 427, (1914); Kennedy v. Duncklee, 1 Gray 65 (Mass. 1854); Delano v. Wilde, 11 Gray 17 (Mass. 1858); Mullin v. Atherton, 61 N. H. 20 (1881); Jackson v. Cadwell, 1 Cow. 622 (N. Y. 1824).

[94]In Marks v. Cowles, 61 Ala. 299, 306 (1878), it was said that the distinction between extension on *elegit* and sale to a party was shadowy rather than substantial. In Corwith v. The State Bank of Wis., 15 Wis. 317, 320 (1862), it was said that there was no distinction. In Mullin v. Atherton, 61 N. H. 20 (1881), a case of sale to a party, the cases cited by the court were those on *elegit*.

[95]See Corwith v. The State Bank of Wis., 15 Wis. 317, 319 (1862).

[96]2 Abb. 479, 489, Fed. Cas. No. 13,189 (C. C. 9th, 1868). It is to be noted that Mr. Justice Field changed his mind in five years. See Galpin v. Page, 18 Wall. 350, 374, 21 L. ed. 959 (U. S. 1873).

[97]See Bickerstaff v. Dellinger, 1 Murphy 272, 275 (N. C. 1809).

[98]1 A. K. Marsh. 217, 218 (Ky. 1818).

[99]It was this line of reasoning that was approved by Mr. Justice Field. (See note 96, *supra*).

[100]5 Mon. 445, 452 (Ky. 1827).

[101]125 Ky. 424, 101 S. W. 362 (1907).

erty in kind if the appellee still had it.[102] In Nebraska, in *McAusland v. Pundt,*[103] it was said that the real reason for the rule of restitution *in specie* was that it was easier and simpler to "square up" by handing back the identical land, but that a surer and more just measure of restitution was to restore the proceeds of the sale, since it might be rightfully stripped by the purchaser or its value increased by him.[104] In Louisiana the court was at first with the majority,[105] but went over to the minority side where it has since remained.[106]

The reasons given by the courts for the rule of restitution *in specie,* where a party purchases, vary from a simple statement that the party is presumed to have notice of all the steps in the proceedings and that he is bound to know that all the proceedings are legal,[107] to analysis of the interests involved.[108]

Where the judgment is modified or reversed in such manner as to defeat the plaintiff's claim in part only, there is conflict between the decisions as to the correct rule and the reasons therefor. If the judgment is modified by reducing the amount thereof, it is held in California and Nevada that the defendant has lost nothing by the sale and is completely protected by restitution of the excess or by remittitur.[109] In Iowa, on the other hand, the plaintiff may

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[102]Drover's Bank v. Northern Coal Co., 133 Ky. 773, 119 S. W. 151 (1909); Crume v. Sherman, 186, Ky. 376, 215 S. W. 196 (1919).

[103]1 Neb. 211 (1871).

[104]It is probable that Nebraska is now with the majority. *Cf.* Nelson v. Beatrice, 2 Neb. (Unoff.) 47, 96 N. W. 288 (1901). As to increase or decrease in value see Ft. Madison Co. v. Bank, 77 Ia. 393, 42 N. W. 331 (1889) and notes 84, 85, *supra.*

[105]Graham v. Egan, 15 La. Ann. 97 (1860), where it was said that on a devolutive appeal the appellant was entitled to *restitutio in integrum* if the appellee had bought. (Citing D., IV, 1, 1-2-3).

[106]Pasley v. McConnell, 38 La. Ann. 474 (1883); Holland v. Bryan, 148 La. 999, 88 So. 246 (1921). The rule in Louisiana is that the appellant can protect himself, as to the property itself, only in case of suspensory appeal.

[107]See Hay v. Bennett, 153 Ill. 271, 288, 38 N. E. 645, 650-651 (1894), where Mr. Justice Baker said: "The foundation stone of the distinction between the case of parties to the suit and third parties is the element of notice. The law presumes that a party . . . has notice of every fact and step in the proceedings . . . and he is bound to know that all the proceedings are legal."

[108]See Marks v. Cowles, 61 Ala. 299, 305 (1878), where it was said: "We cannot perceive that subsequent purchasers from the party can in right or on any principle of policy, claim the protection which is extended to a stranger purchasing at a judicial sale. The prevention of the sacrifice of property, at such sales, the security of titles acquired at them, does not require it. The sale is an accomplished fact, and the sacrifice, as it has been said, is realized or avoided."

[109]The appellant can have restitution of excess interest when the judgment is modified in such manner as to exclude that interest. Yndart v. Den, 125 Cal. 572, 57 Pac. 671 (1899). He can demand a reconveyance, after modification of judgment of foreclosure by reduction of the amount, only on tendering the reduced amount. Barnhart v. Edwards, 128 Cal. 85, 61 Pac. 176 (1900). Where the modification consists in reduction of the amount, resti-

insist upon restoring the property in kind—the reasons given being that the defendant could have insisted on restitution *in specie* and that the right is reciprocal; and the plaintiff cannot be forced to take the property at his bid since he made the bid under the belief that he had a judgment for a greater amount and bought the property thinking that it was perhaps all he could get.[110]

If the judgment is in form reversed so as to defeat only part of the plaintiff's claim, it is held in Wisconsin that the sale should not be set aside unless it is shown that there was some unfairness in the sale or that a larger amount would be realized at a second sale.[111] This decision was disapproved in California on the ground that the Wisconsin court failed to consider the difference between a reversal and a modification, in that the former destroyed the original judgment as between the parties.[112]

If the judgment is void, as distinguished from reversed for error, there is the same disagreement as to the right of the party to rely upon the sheriff's return, as was seen in cases involving third party purchasers. In Missouri it is held that the question is not whether the purchaser is a party or a stranger, but whether he is innocent or not;[113] and in Oklahoma, that a party is not innocent whether he knows of the lack of actual service or not.[114]

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tution may be made by remittitur. Martin v. Victor Mill. & Min. Co., 19 Nev. 197, 9 Pac. 336 (1885). These three cases were decided under statutes providing that, "Where the judgment or order is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment or order." CAL. CIV. PR. ACT, § 957; NEV. CIV. PR. ACT, § 339. In the Martin case, *supra*, the court said: "It is only in cases where the judgment is reversed or so far modified that it would be inequitable to allow the sale to stand, that a court would be authorized, under the statute, to set the sale aside."

[110]Munson v. Plummer, 58 Ia. 736 (1882). Here the modification reduced the judgment below the amount of the plaintiff's bid. The court, reasoning as set forth in the text, said that it would be inequitable to make him pay unless it appeared that the appellant would be prejudiced by non-payment. It does not seem that the fact that the plaintiff would be forced to pay from his own pocket is a conclusive distinction. *Cf.* Yndart v. Den, 125 Cal. 572, 57 Pac. 671 (1899).

[111]Jessup v. City Bank, 15 Wis. 604 (1862). The court distinguished the case of Corwith v. The State Bank of Wis., 15 Wis. 289 (1862) on the ground that there was, in that case, only a personal judgment which, on reversal, afforded no ground for the making of the sale; while in the Jessup case, there was a judgment of foreclosure.

[112]Cowdery v. London Bank, 139 Cal. 298, 73 Pac. 196 (1903). It is to be noted that in this case the reversal reduced the amount of the judgment of foreclosure, but that the judgment which the lower court was directed to enter was still greater than the sale price of the land. *Cf.* Martin v. Victor Mill. & Min. Co., 19 Nev. 197, 9 Pac. 336 (1885) and Barnhart v. Edwards, 128 Cal. 85, 61 Pac. 176 (1900) (both set forth in note 109, *supra*).

[113]Smoot v. Judd, 184 Mo. 508, 83 S. W. 481 (1902).

[114]Arnold v. Joines, 50 Okla. 4, 150 Pac. 130 (1915); Pettis v. Johnston, 78 Okla. 277, 190 Pac. 681 (1920).

In those states where there is a statute covering the effect of reversal as to restitution, the typical statute, which provides that the title of the purchaser shall not be affected,[115] is construed to apply only to *bona fide* purchasers (strangers to the action),[116] except in peculiar circumstances where the court finds that it would be inequitable to require the party purchaser to make restitution.[117] This construction; namely, that the statute enacts the existing law, has been found impossible in Pennsylvania, where the terms of the act require the courts to hold that party purchasers are protected as to title.[118]

The right of the appellant to have restitution against the attorney of the plaintiff, while it is put upon the basis that he knew all the steps of the proceedings and knew that appellate proceedings had been begun,[119] can be seen, nevertheless, to be founded on the idea that the attorney has some interest in the result of the action and is in effect a moving party. There is, undoubtedly, also a feeling that, however free from notice of error a third party may be, the attorney must be held to knowledge of the errors of the court in a case in which he took part.

The reason for the rule allowing restitution in kind against the assignee of the judgment is based by the courts upon the theory that he will not be injured by restitution since he will have all the rights which his assignor would have had.[120] As to the assignee of the certificate of purchase, the rule is founded upon the theory first enunciated in *Reynolds v. Harris*[121]—namely, that until the

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[115] *E.g.*, "If any judgment or judgments, in satisfaction of which any lands or tenements are sold, shall at any time thereafter be reversed, such reversal shall not affect the title of the purchaser or purchasers . . ." NEB. CODE, § 508; NEB. REV. L. (1913) § 8807; NEB. COMP. STAT. (1922) § 9023.

[116] See Nebraska, Ohio, and West Virginia cases in note 65, *supra*, and Murray v. Berdell, 98 N. Y. 480 (1885) (construing N. Y. CODE CIV. PR. § 1323); Marlee v. Bitlar, 257 N. Y. 240, 177 N. E. 434 (1931) (construing N. Y. CIV. PR. ACT § 587).

[117] McBride v. Longworth, 14 Ohio St. 349 (1863). The payment by the purchasing party had been distributed to him and to the other creditors. The court made an attempt to distinguish the purchaser out of the class of purchasing "parties" by mentioning the fact that the sale had been made on petition of the appellant and cross-petitions of parties other than the purchaser.

[118] Lengert v. Chaninel, 208 Pa. 299, 57 Atl. 561 (1904).

[119] Hays v. Cassell, 70 Ill. 669 (1873).

[120] Reynolds v. Harris, 14 Cal. 667, 681-82 (1860). The court's attitude was that it made no difference whether the assignee got, by his purchase, an equity or an inchoate legal title which would ripen into a legal estate after the expiration of the period of redemption, as in either case he would have all his assignor's rights. It expressly refused to decide in advance what would be the result if the assignee of the certificate were not also the assignee of the judgment.

[121] 14 Cal. 667 (1860). *Accord*: Hays v. Cassell, 70 Ill. 669 (1873); Roberts v. Clelland, 82 Ill. 538 (1876); Smith v. Huntoon, 134 Ill. 24, 24 N. E. 971 (1890); Singly v. Warren, 18 Wash. 434, 51 Pac. 1066 (1898).

purchaser receives the sheriff's deed he has only a lien or an equity and, not being clothed with legal title, can claim no higher rights than his assignor. When, however, he has received the sheriff's deed, thus perfecting his title, the appellant's equity of restitution is destroyed.[122]

(C) Substituted restitution after sale on execution

The purchaser at the execution sale may have been a stranger from whom the property cannot be recovered *in specie*, or he may have been a person from whom that type of restitution could be had.[123] In the former case, it is evident, the appellant's only remedy is to recover from the appellee a sum of money as substituted restitution. Whatever the procedure[124] the question of measure must arise, as the appellant might be entitled either to the proceeds of the sale or to the value of the property. The method chosen by the courts to determine the measure of recovery has been interpretation of the words "restitution to the other party for what he has lost,"[125] or "a money equivalent."[126] In spite of the fact that the recovery is, in any form of procedure, on the theory of assumpsit, there has been mention of the forms available to the appellant under that theory in one case only.[127] The general rule, in the absence of statute, is that if the sale is to a stranger, recovery from the appellee is had upon the theory of "money had and received,"[128]

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[122]South Fork Canal Co. v. Gordon, 2 Abb. 479, Fed. Cas. No. 13,189 (C. C. 9th, 1868); Guiteau v. Wisely, 47 Ill. 433 (1868). While there was talk of other possible grounds in the Canal Co. case (see note 99, *supra*), the point in issue was the right of the appellant against an assignee and Mr. Justice Field expressly distinguished Reynolds v. Harris, Note 121, *supra*, upon the ground that the assignee in the Canal Co. case had perfected his legal title.

[123]It is of course possible that the appellant will purchase the property, in which case he recovers only the amount paid by him. McCracken v. Paul, 65 Ark. 553, 47 S. W. 854 (1898); and, if an assignee of the defendant redeems, the latter is entitled, on reversal, to credit of the money paid to redeem against the judgment given on retrial. Schoonover v. Osborne, 117 Ia. 427, 90 N. W. 844 (1902).

[124]See notes 49-53, *supra*.

[125]See Bank of United States v. Bank of Washington, 6 Pet. 8, 17, 8 L. ed. 304 (U. S. 1832).

[126]See South Fork Canal Co. v. Gordon, 2 Abb. 479, 489, Fed. Cas. No. 13,189 (C. C. 9th, 1868).

[127]Smith v. Zendt, 83 Ind. 86 & 442 (1882), distinguishing Martin v. Woodruff, 2 Ind. 237 (1850). It seems reasonable that the appellant should receive only the money which the appellee has had, if he chooses to sue for "money had and received." *Cf.* Jones v. Hoar, 5 Pick. 385 (Mass. 1827); Abbot v. Blossom, 66 Barb. 353 (N. Y. 1873); Felder v. Reeth, 34 F. (2d) 744 (1929), wherein there is talk of the various counts when restitution is asked on grounds other than reversal.

[128]Hess v. Deppen, 125 Ky. 424, 101 S. W. 362 (1907); Pasley v. McConnell, 38 La. Ann. 474 (1883); Smith v. Phillips, 175 La. 198, 143 So. 47 (1932); Gay v. Smith, 38 N. H. 171 (1859); State Bank v. Ladd, 65 Okla. 14, 162 Pac. 684 (1917); Niedermeyer v. Fehl, 35 P. (2d) 477 (Ore. 1934). *Contra*: Bickerstaff v. Dellinger, 1 Murphy 272 (N. C. 1809); Hays v. Griffith, 85 Ky. 375, 3 S. W. 431 (1887). It is interesting to note that, when Kentucky came

and if the sale is to a party or assignee of the judgment, upon "goods sold" or "land sold."[129] If the judgment is void and the appellant chooses to sue for the proceeds of the sale he may have restitution in that manner.[130]

IV. Restitution *in specie* Against Purchasers From Parties[131]

Where restitution *in specie* is sought against a person who has purchased the property[132] from a party to the judgment there is no real majority rule as to the protection accorded to the purchaser who buys between judgment and filing of a bill of review or writ of error.[133] The rule appears to be the same in cases of

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into line with the majority rule as to restitution in kind, she also came into line with the majority as to the measure of restitution when a stranger purchases at execution sale. *Cf.* Hays v. Griffith, *supra*, with Hess v. Deppen, *supra*.

Under the typical statutes the measure of restitution is the proceeds of the sale. Neb. Code § 508 (see note 115, *supra*) continues: " . . . but in such case [reversal after sale] restitution shall be made by the judgment creditor, of the moneys for which such lands or tenements were sold . . . " See also the statutes cited in notes 65 and 116, *supra*, and Cal. Code Civ. Pr. § 857, construed in Dowdell v. Carpy, 137 Cal. 333, 70 Pac. 167 (1902).

[129]McCracken v. Paul, 65 Ark. 553, 47 S. W. 854 (1898); Reynolds v. Hosmer, 45 Cal. 616 (1873); Smith v. Zendt, 83 Ind. 86 & 442 (1882); Drover's Bank v. Northern Coal Co., 133 Ky. 773, 119 S. W. 151 (1909); see Hays v. Griffith, 85 Ky. 375, 380, 3 S. W. 431, 432 (1887), where it was said, "It is true that he has received only what the land sold for, but at the same time he has been the means of depriving the owner of its real value," and that this rule was the more necessary in Kentucky where a party purchaser got a title not defeasible by reversal.

[130]Martin v. Woodruff, 2 Ind. 237 (1850); Sturm v. Fleming, 31 Va. 701, 8 S. E. 263 (1888).

[131]The word "party," as used in this section, includes those persons against whom the appellant could have had restitution *in specie* if they had bought at execution sale. (See notes 77-79 and 88-91, *supra*). The word "purchaser" includes only *bona fide* purchasers for value. Thus, the attorney of a party purchaser does not buy in good faith from his client. O'Brien v. Harrison, 59 Ia. 686, 12 N. W. 256 (1882); Mullin v. Atherton, 61 N. H. 20 (1881); Stroud v. Casey, 25 Tex. 740 (1860). Nor, where the money actually paid to the sheriff is only the amount of the costs, do purchasers who pay only that sum to their grantors buy in good faith. O'Brien v. Harrison, *supra*.

[132]Only cases concerning land have been found.

[133]A purchaser who buys from a party *after* reversal, buys nothing. Twogood v. Franklin, 27 Ia. 239 (1869); Real Estate Savings Inst. v. Collonious, 63 Mo. 290 (1896); Adams & Wickes v. Odom, 74 Tex. 206, 12 S. W. 34 (1889). As to purchase between judgment and decision on appeal, as distinguished from other appellate proceedings, the courts are practically unanimous in holding that a purchaser who buys before final decision buys subject to the final judgment. Marks v. Cowles, 61 Ala. 299 (1878); Smith v. Huntoon, 134 Ill. 24, 24 N. E. 971 (1890); Hopkins v. Patton, 257 Ill. 346, 100 N. E. 992 (1913); Dunnington v. Elston, 101 Ind. 373 (1884); Farmers' Bank v. First Nat'l. Bank, 30 Ind. App. 520, 66 N. E. 503 (1902); Olson v. Leibpke, 110 Ia. 594, 81 N. W. 801 (1900); Kremer v. Schutz, 82 Kan. 175, 107 Pac. 780 (1910); Debell v. Foxworthy, 9 B. Mon. 228 (Ky. 1848); Smith v. Burns, 72 Miss. 966, 18 So. 483 (1895); Carr v. Cates, 96 Mo. 271, 9 S. W. 659 (1888); Thompson v. Thompson, 1 Coxe 159 (N. J. L. 1793); Randall v. Snyder, 64 Tex. 350 (1885); Patterson v. Old Dominion Co., 149 Va. 597, 141 S. E. 759 (1928). See Aldrich v. Chase, 70 Minn. 243, 246, 73 N. W. 161 (1897); Ritson v.

purchase from a party who bought at his own execution sale, and in cases of purchase from a party to a judgment adjudicating some antecedent right in the property; nor can any difference be accounted for by distinctions between situations in which the judgment is part of the chain of title and those in which it is not.[134]

In some courts the question is decided on formalistic grounds. If the appellate procedure is of right,[135] is controlled by statute,[136]

Dodge, 33 Mich. 463, 464 (1896); Salvation Army Inc., Trustee v. Lawson, 293 Pa. 459, 463, 143 Atl. 113 (1928).

In California, the purchaser is protected if he bought before appeal filed. Di Nola v. Allison, 143 Cal. 106, 76 Pac. 976 (1904). In West Virginia the statutory *appeal* is analogous to *writ of error*, the former lying in equity and the latter at law. An *appeal* there does not affect the purchaser until sued out. Wingfield v. Neall, 60 W. Va. 106, 54 S. E. 47 (1906); Wheeling Creek Gas Co. v. Elder, 170 Fed. 215 (C. C. N. D. W. Va. 1909). In Missouri, under the influence of a dictum in Gott v. Powell, 41 Mo. 416, 420 (1867), to the effect that a party purchaser takes a defeasible title, but that there is an exception "where a third person has *bona fide* acquired some collateral right before reversal," a purchaser from a third party is protected up to reversal. Vogler v. Montgomery, 54 Mo. 577 (1874); Macklin v. Allenberg, 100 Mo. 337, 13 S. W. 350 (1890). In New York, under N. Y. Civ. Pr. Act § 586, the appellant is protected only if he files a bond for supersedeas. Lowenstein v. Reiker, 258 N. Y. 444, 180 N. E. 113 (1932).

Other forms of procedure leading to an opposite judgment (not including writ of error or bill of review):

A *rehearing* is like an appeal from a court to itself, and a purchaser from a party before final judgment buys subject to final judgment. Bird v. Gilliam, 125 N. C. 76, 34 S. E. 196 (1899). If a party may have a *new trial* as of right, a purchaser from a party buys subject to the result of the new trial. Smith v. Cottrell, 94 Ind. 379 (1883); Brown v. Cody, 115 Ind. 484, 18 N. E. 94 (1888); Griswold v. Ward, 128 Ind. 389, 27 N. E. 751 (1891) [Right of new trial given by Ind. Rev. Stat. (1881) § 1066.] A purchaser from a party to a decree for partition buys subject to a change in decree at the same term—this is in effect like a motion for a new trial. Sharp v. Elliott, 70 Tex. 666, 8 S. W. 488 (1888). The lien of a judgment is destroyed by the setting aside of the judgment and a purchaser is protected until decision on appeal. Brown v. Curtis, 155 Mo. App. 376, 137 S. W. 24 (1911). *Dismissal* of a suit ends the *lis pendens* arising from attachment and a purchaser before notice, to the party, of a motion to reinstate is protected. Davis v. Hall, 90 Mo. 659, 3 S. W. 382 (1886).

As to bill of review, writ of error, *certiorari*, and infants' statutory rights see Appendix, *infra*.

[134]But *cf.* Griswold v. Ward, 128 Ind. 389, 27 N. E. 751 (1891).

[135]Smith v. Cottrell, Brown v. Cody, Griswold v. Ward (Indiana cases, all cited note 133, *supra*).

[136]Clary v. Marshall's Heirs, 4 Dana 96 (Ky. 1836); Debell v. Foxworthy, 7 B. Mon. 228 (Ky. 1848); Earle v. Couch, 3 Metc. 455 (Ky. 1861). See, also, Blanton v. Rose, 70 Ark. 415, 418, 68 S. W. 674 (1902), where it was said that a statute allowing infants to show cause after reaching majority is notice to the world, and that there could not, then, exist an innocent purchaser as against the infants. In Hoosier Const. Co. v. Seibert, 63 Ind. App. 594, 605, 114 N. E. 981 (1917) it was said by Caldwell, J. "A person having knowledge of an appealable cause is conclusivey presumed to know that a judgment entered in such cause may be appealed from within a limited time."

or carries the case up *de novo* on the merits,[137] it is held that such procedure is a continuation of the original action, and the appellant is entitled to restitution *in specie*. In other courts the same result is reached on the theory that the party purchaser's title is defeasible and that a purchaser from him takes merely this title, its defeasible nature being imposed on it by law.[138]

Many courts which protect a purchaser from a party do so upon formalistic grounds; some saying simply that a bill of review or writ of error is a new suit, the original judgment having been final;[139] others analyzing the difference in procedure between appeals and bills of review or writs of error.[140] Other courts protect such a purchaser upon the ground that a judgment is worthless to the successful party for an unduly long period if he cannot freely sell the property to which his right was affirmed until after the passage of the time allowed for suing out a bill of review or

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[137]See Elliott & Co. v. Toeffner, 187 U. S. 327, 333, 47 L. ed. 200, 203, 23 S. Ct. 133 (1902). In Wingfield v. Neall, 60 W. Va. 106, 113, 54 S. E. 47 (1906) it was said, "An appeal is a process of civil law origin, and removes a cause entirely, subjecting the facts as well as the law, to a review and retrial . . . At common law an appeal was taken at the same term and vacated the original judgment"; and in Farmers' Bank v. First Nat'l. Bank, 30 Ind. App. 520, 66 N. E. 503 (1902), that any person buying between the filing of a *lis pendens* and final determination on appeal is affected with notice, as an appeal is but the prosecution of the same suit in a higher court.

[138]See Marks v. Cowles, 61 Ala. 299 (1878); Gato v. Christian, 112 Me. 427, 431, 92 Atl. 489 (1914); Ritson v. Dodge, 33 Mich. 463, 464 (1896); Stuart v. Coleman, 78 Okla. 81, 83, 118 Pac. 1063 (1920); Harle v. Langdon's Heirs, 60 Tex. 555, 563 (1883); Cordray v. Neuhaus, 61 S. W. 415, 418 (Tex. Civ. App. 1901). In Marks v. Cowles, *supra* at 307 it was said: "If the principle is admitted, and it is admitted [in the courts of various states] that a party purchasing under his own judgment or decree acquires but a defeasible title . . . it is difficult to see how there can be an innocent purchaser from a party, entitled to protection which would not be extended to the party himself."

[139]Rector v. Fitzgerald, 59 Fed. 808 (1894); see Cheever v. Minton, 12 Colo. 557, 559 (1889); Stout v. Gully, 13 Colo. 604, 606, 22 Pac. 954 (1889); Ure v. Ure, 223 Ill. 454, 464, 79 N. E. 153 (1906); Eich v. Czervonko, 330 Ill. 455, 460, 161 N. E. 864 (1928); Aldrich v. Chase, 70 Minn. 243, 246, 73 N. W. 161 (1897); Heirs of Ludlow v. Kidd's Ex'rs., 3 Ohio 541, 549 (1828); Salvation Army Inc. Tr. v. Lawson, 293 Pa. 459, 464, 143 Atl. 113 (1928). In Clayton v. Anthony, 15 Gratt. 518, 526 (1859), Judge Lee said: "A bill of review forms no part of the proceedings in the original case, it is allowed only after the suit is completely ended."

[140]Macklin v. Allenberg, 100 Mo. 337, 13 S. W. 350 (1890); Wingfield v. Neall, 60 W. Va. 106, 54 S. E. 47 (1906). In Macklin v. Allenberg the court pointed out that the common law distinction between *appeal* and *writ of error* had been preserved in the statutes [see Mo. Rev. Stat. (1879) § 3743 *et seq.*] in that *appeal* lay in the term at which the judgment was rendered, while *writ of error* might be sued out within three years and required notice to the other party. In the Wingfield case, it was pointed out that in West Virginia a writ of error does not lie of right, nor does it remove the case for trial *de novo*, nor is it taken at the same term, nor is application made to the trial court (see also discussion of the West Virginia rule on *appeal* in note 133, *supra*).

writ of error.[141] It is also pointed out that the losing party can protect himself by giving bond where there is a provision for the filing of a bond, or by suing out his bill or writ promptly;[142] and that purchasers are entitled, when the original litigation is at an end, to rely on the judgment.[143]

If the property has passed from the hands of the party, the appellant may, if he chooses, recover the value thereof on reversal on appeal;[144] or the proceeds received by the appellee on reversal on bill of review or writ of error.[145] This distinction is made upon the ground that in the case of appeal, as distingushed from the other appellate proceedings, there is no judgment to execute.[146]

Conclusion

It appears, in general, that the courts have not failed to consider the various interests concerned in all claims for restitution. In those cases where the matter involves the interests of the parties alone, and the claim of one to specific property arises solely from an erroneous judgment it is proper that the appellant should have restitution *in specie* on reversal, the interest in freedom from arbitrary judicial action controlling. This arises from the fact that there is no satisfactory substitute for the enjoyment of a thing itself, and from the fact that it is important that men think that they are getting justice, as well as that they do get justice.

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[141] See Cheever v. Minton, 12 Colo. 557, 560 (1889); Eich v. Czervonko, 330 Ill. 455, 462, 161 N. E. 864 (1928). In Dunfee v. Childs, 59 W. Va. 225, 240, 53 S. E. 209 (1906), it was said: "I ask if it can possibly be the law that one who buys or recovers land under a decree must wait three years for a bill of review, or two years for an appeal, or five years for a motion to reverse, before he can sell to a *bona fide* purchaser and give him a good title? Is it the policy of the law to thus tie up land? . . . The successful party ought not to have his title clouded and the value of his property diminished for three years by two doubtful contingencies: 1. That a writ of error will be sued out; and 2. That a reversal will take place." The same attitude is shown in Missouri; *cf.* Macklin v. Allenberg, 100 Mo. 337, 346, 13 S. W. 350 (1890) with Westminster College v. Fry, 192 Mo. 552, 561, 91 S. W. 21 (1905). Compare the attitude shown in Texas by the quotation from Harle v. Langdon's Heirs, 60 Tex. 555, 560 (1883) in note 2, *supra*.

[142] Macklin v. Allenberg, 100 Mo. 337, 346, 13 S. W. 350 (1890).

[143] Wadhams v. Gay, 73 Ill. 415, 422 (1874); Macklin v. Allenberg, 100 Mo. 337, 345, 13 S. W. 350 (1890); Dunfee v. Childs, 59 W. Va. 225, 240, 53 S. E. 209 (1906). It was said in Wadhams v. Gay, *supra*, "The principle is . . . said to be that society should be able to rely on the judgments and decrees of its courts, and although it knows that they are liable to be reversed, it has a right, so long as they stand, to presume that they have been properly rendered." Compare the attitude of courts which feel that the important consideration is the keeping of the property within the power of the courts in order that force and effect may be given to their judgments. See Dunnington v. Elston, 101 Ind. 373, 375 (1884) and especially Olson v. Leibpke, 110 Ia. 594, 597, 81 N. W. 801 (1900).

[144] Thompson v. Thompson, 1 Coxe 159 (N. J. L. 1793).

[145] Thompson v. Davis, 297 Ill. 11, 130 N. E. 455 (1921).

[146] Thompson v. Thompson, 1 Coxe 159 (N. J. L. 1793).

Where, however, the result of the judgment is to cause the payment of a sum of money by one party to the other, it appears that those courts which will examine the merits of the case between the parties have adopted the preferable rule. If the proceedings for restitution, whether by motion, independent bill, or action in assumpsit, are in a court which tries cases on the facts there seems to be no valid reason why a case should not be tried as to the merits in this type of proceeding, rather than sending the parties back to begin all over again. In this type of case, unlike cases of transfer of specific property, there is an adequate substitute for the use of the property—interest can be, and is, allowed for such period as the appellee unjustly detains the money if it should appear that he is not, on the merits, entitled to retain it. If the proceedings are in an appellate court which does not try facts, the position of those courts which refuse to be put to the endless difficulty of perhaps being required to examine into the merits of every case that comes before them appears to be justifiable. In such event, the practice of the courts which send the case back to the trial court for inquiry into the property of restitution will arrive at the correct result.[147]

If the appellant is unable to pay his debts promptly in cash, but is not insolvent, it is not proper that a party who may have a good cause of action but who has had judgment through some error of the court should be compelled to repay to his opponent the sum of money which he has thus obtained, only to have it dissipated and to find himself compelled to pursue the possibly unsatisfactory remedy of sale of that opponent's property on execution after another judgment in favor of the party successful at the first trial. On the other hand, since it is possible that the appellee does not have a good cause of action, it is not proper that the appellant be compelled to take the risk of being able to collect easily if he is finally adjudged to be entitled to restitution. Complete protection can be given to both parties by requiring that the appellee, on reversal, pay the money into court to await the outcome of the proceedings for restitution.

If the appellant is insolvent there seems to be a disregard for the interests of his other creditors if the courts consider only the merits between the parties. Unless the appellee is entitled to priority there is no valid reason why, through an error of the trial court, he should have priority.

If the transfer of property has been brought about by sale on execution to the successful party,[148] the interests to be considered

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[147]The possible effect of the VIth Amendment to the Constitution of the United States must not be overlooked.

[148]See notes 88-91, *supra*.

and the result are the same as in cases of transfer of property *in specie*. If, however, the sale is to a stranger the result is correctly otherwise. It is undoubtedly true, as said by many of the judges, that, unless strangers are protected they will not buy at execution sales or, if they do, will pay only a gambler's price for the property. Thus the plaintiff will get little good from his judgment and execution, as, if the appellee is successful in the appellate procedure, he will not have had his just dues; and the property of the appellant will have been sacrificed as an unnecessarily small part of his debt will have been paid.

If the property has been sold on execution to the opposing party and he has aliened or consumed it, it is proper that he be held to restitution of its value. While it is true that he has committed no tort, the measure is unanimously said to be that the appellant "shall be restored to all that he has lost by occasion of the judgment," and the appellee has in fact caused the injury. If, on execution, the property has been sold to a stranger, the appellee has equally caused the injury. It does not seem that sufficient weight is given to the appellant's interest by the majority rule, which holds the measure of restitution to be the proceeds of the sale. This measure may well be correct in cases where the appellant has refused, though able, to pay. It cannot, however, be said with truth in all cases that he should have paid and that the loss is due to his own fault or folly. If he cannot pay, except after sacrifice of his property, the protection which many courts find in the statutes providing for the filing of supersedeas bonds is illusory. There is some protection in the practice of setting aside sales which are improperly made[149] and some in the statutes of those states which set aside sales made at less than a specified portion of the assessed value of the property. It is questionable whether in all these there is enough protection against improper sacrifice of the appellant's property.

It is submitted that correct protection will be given to all parties through the following procedure. First: The judgment debtor may file a supersedeas bond in the value of the property on which the levy is made. If he refuses, the sale may proceed and all titles acquired at the sale will be absolute. If he is unable to procure such a bond he may take an oath, subject to examination, that his failure to pay or to file a bond for supersedeas is caused by inability to pay or to procure a bond without sacrifice of his prop-

[149]See Smith v. Huntoon, 134 Ill. 24, 31, 24 N. E. 971 (1890). In this case property worth $1500 was sold for $71.65 on execution of a debt of $46.67. The sale was set aside on the ground that there was sufficient basis for equitable intervention where the property was sold *en masse* when the sale of a part would have covered the debt, and where the price was grossly inadequate.

erty. Second: If the judgment debtor supplies a satisfactory oath, the judgment creditor may file a bond in the value of the property on which the levy is made and proceed to sell on execution and all titles acquired at the sale will be absolute. If the judgment goes finally in favor of the appellant, the appellee may restore the property *in specie* if able; otherwise the appellant is protected by the bond. Third: If the appellee is unwilling or unable to furnish a bond, he may not sell the property on execution, but will have a lien thereon which will persist until final decision—at which time, if the decision is in his favor he may sell on execution.[150]

It will be noted that this method of procedure protects both parties. If the judgment debtor refuses to pay or to file a bond, the creditor may realize. If the former is unable to pay, the latter may sell if he wishes to take the chance of reversal; if he is unwilling to take the chance of reversal, he has his security in the property. If the creditor is unable to assure complete restitution, the property of the debtor is not sacrificed nor is he unable to get restitution. If the judgment goes finally in favor of the creditor, the property of the debtor may be sold, and, while the sale will probably be at a sacrifice price, the creditor will presumably collect the same amount that he would have collected by sale on the first judgment.

If the property is transferred to a party and by him to a *bona fide* purchaser for value, the correct result is reached by those courts which protect the appellant through rehearing, new trial, and appeal.[151] These proceedings are taken promptly and it is no great hardship to charge possible purchasers with the duty of examining the records for such procedure; nor is it unduly hard upon parties to restrict their freedom of alienation for the short periods involved. Where, however, those forms of appellate procedure, which may be brought several years after the original judgment, are concerned the result is different. The interest in freedom of alienation militates against a rule protecting the appellant as to restitution of the property *in specie*. If he wishes to protect himself, he may bring his appellate proceedings promptly, or be content with substituted restitution if he obtains a reversal and a later judgment in his favor.

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[150]Difficulty of adequate recordation may make this solution inapplicable to certain kinds of personal property.

[151]But, as to *appeal*, see note 133, *supra*, with respect to West Virginia.

APPENDIX

In the following cases it was held that a purchaser from a party is protected where he buys between judgment and filing of the *bill of review*. Rector v. Fitzgerald, 59 Fed. 808 (C. C. A. 8th, 1894); Blanton v. Rose, 70 Ark. 415, 68 S. W. 674 (1902); Aldrich v. Chase, 70 Minn. 243, 73 N. W. 161 (1897); Heirs of Ludlow v. Kidd's Ex'rs., 3 Ohio 541 (1828); Salvation Army,

Inc., Tr. v. Lawson, 293 Pa. 459, 143 Atl. 113 (1928); Laidley v. Merrifield, 7 Leigh 346 (Va. 1836); Clayton v. Anthony, 15 Gratt. 518 (Va. 1859); Dunfee v. Childs, 59 W. Va. 225, 53 S. E. 209 (1906); Parkins v. Pfalzgraff, 60 W. Va. 121, 53 S. E. 913 (1906).

In the following cases it was held that such a purchaser buys subject to final decision on *bill of review*. Clarey v. Marshall's Heirs, 4 Dana 96 (Ky. 1836); Debell v. Foxworthy, 7 B. Mon. 228 (Ky. 1848); Earle v. Couch, 3 Metc. 455 (Ky. 1861); Cook v. French, 96 Mich. 525, 56 N. W. 101 (1893).

A purchaser from a party is protected where he buys between judgment and the suing out of *writ of error*. Cheever v. Minton, 12 Colo. 557 (1889); Stout v. Gully, 13 Colo. 604, 22 Pac. 954 (1889); Wadhams v. Gay, 73 Ill. 415 (1874); Hannas v. Hannas, 110 Ill. 53 (1884); Eich v. Czervonko, 330 Ill. 455, 161 N. E. 864 (1928); McCormick v. McClure, 6 Blackf. 466 (Ind. 1843); Macklin v. Allenberg, 100 Mo. 337, 13 S. W. 359 (1889); Lessee of Taylor v. Boyd, 3 Ohio 338 (1828); see Ure v. Ure, 223 Ill. 454, 79 N. E. 153 (1906); Thompson v. Thompson, 1 Coxe 159 (N. J. L. 1793); Salvation Army, Inc., Tr. v. Lawson, 293 Pa. 459, 143 Atl. 113 (1928); Wingfield v. Neall, 60 W. Va. 106, 54 S. E. 47 (1906).

A purchaser from a party buys subject to final decision on *writ of error*. Harle v. Landon's Heirs, 60 Tex. 555 (1883); Randall v. Snyder, 64 Tex. 350 (1885); Cordray v. Neuhaus, 61 S. W. 415 (Tex. Civ. App. 1901); *cf.* Debell v. Foxworthy, 7 B. Mon. 228 (Ky. 1848); Smith v. Burns, 72 Miss. 966, 18 So. 483 (1895).

In Missouri a purchaser is not protected when he buys between judgment and the suing out of a *writ of error*, provided that a bill of exceptions is filed within the short period allowed for such filing. Westminster College v. Fry, 192 Mo. 552, 91 S. W. 21 (1905).

In Illinois today, under CIV. PR. ACT, § 106, a *writ of error* is not a supersedeas unless so ordered by the supreme or appellate court or by a judge thereof in vacation, nor unless a bond is filed. Hopkins v. Patton, 257 Ill. 346, 100 N. E. 992 (1913); Kuzak v. Anderson, 267 Ill. 609, 108 N. E. 662 (1915). In that state a purchaser is protected if he buys from a party between judgment and reversal on *certiorari*. Thompson v. Davis, 297 Ill. 11, 130 N. E. 455 (1921).

A purchaser from a party buys subject to final decision in any form of appellate proceeding, including proceedings for review in the Supreme Court of the United States. Bird v. Gilliam, 125 N. C. 76, 34 S. E. 196 (1899); Stuart v. Coleman, 78 Okla. 81, 118 Pac. 1063 (1920).

If infants are given a statutory right to attack a judgment after reaching majority, purchasers from parties are protected where they bought between judgment and the statutory proceedings. Wadhams v. Gay, 73 Ill. 415 (1874); Heirs of Ludlow v. Kidd's Ex'rs., 3 Ohio 541 (1828). *Contra*: Blanton v. Rose, 70 Ark. 415, 68 S. W. 674 (1902). *Note*: The Ohio rule was enacted in the CODE (§ 11633). Stewart v. Kellough, 104 Ohio St. 347, 135 N. E. 608 (1922) (reversing a holding that this section applied to execution sales only).

EFFECT OF APPELLATE PROCEEDINGS IN STATES HAVING ESTABLISHED A RULE

(In this chart the letter "C" indicates that protection to the appellant against purchasers from a party continues from judgment to final decision in the appellate procedure indicated; the letter "N" indicates that the appellant is not protected as to title against such purchasers from judgment to filing of the proceeding; the sign "*" indicates that special reference must be made to note 133 or to Appendix, *supra*.)

	Appeal	*Bill of Review*	*Writ of Error*
Ala.	C	C	C
Ark.	....	N	....
Cal.	N	....	....
Colo.	....	....	N
Fla.	....	....	N
Ill.	C	N	N *
Ind.	C	....	N
Ia.	C	C	C
Kan.	C	C	C
Ky.	C	C	C
Me.	C	C	C
Mich.	C	C	C
Minn.	C	N	N
Miss.	C	....	C
Mo.	*	*	*
N. J.	C	....	N
N. Y.	*	....	....
N. C.	C	....	C
Ohio	....	N	N
Okla.	C	C	C
Pa.	C	N	N
Tex.	C	C	C
Va.	C	N	N
W. Va.	N *	N *	N *

FEDERAL REMOVAL CONFUSION*

L. C. Andrews†

"And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district." This, the third sentence of Section 2 of the Removal Act of 1887-1888,[1] is also known as the Separable Controversy Clause of the removal statute.[2]

Perhaps there is no clause of the Judicial Code which from the very time of its appearance in the statute books has aroused more disagreement as to its interpretation.[3] Construing the sentence separately from the other sentences in Section 2, and following its literal meaning it would appear that in any suit between a plaintiff of one state and defendant of another state or states, any one or more of the defendants interested in the separable controversy would have the right to remove the case to the federal district court over the objection of the plaintiff.[4] Certainly, it seems clear that

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*I am indebted to Dr. J. J. Lenoir for certain research work on this subject.

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[1]Act of August 13, 1888, 25 STAT. 433, 28 U. S. C. A. § 71.

It is assumed that the cases discussed in this paper involve amounts which are within the jurisdictional amount provided for by Judiciary Acts.

[2]For an explanation of separable controversy, see 54 Corpus Juris, "Removal of Causes," §§ 181-190. Dobie, in explaining a separable controversy, says, "If the pleadings are not consistent, or if a valid judgment must necessarily be either in favor of or against *all* of the defendants in the suit, it seems there is no separable controversy." DOBIE, FEDERAL PROCEDURE (1928) 376, § 95. See, also, Note (1932) 80 U. OF PA. L. REV. 457, in which the writer says, " In search of some guiding principle to follow in determining the separableness of the controversy the test is applied: Can the case be separated into parts so that in one of these parts a controversy will be presented with citizens of one or more states on one side, and citizens of other states on the other side, which can be fully determined in the state court?" See, also, ROSE, FEDERAL JURISDICTION AND PROCEDURE (1931) 368-69, §§ 396-397.

[3]C. A. Boston, *Removal of Suits from State to Federal Courts—A Picture of Chaos Demanding a Remedy* (1919) 88 CENT. L. J. 246.

[4]This was the construction placed upon this statute, through a literal interpretation, by Judge Shiras in Stanbrough v. Cook, 38 Fed. 369 (C. C. N. D. Iowa, 1889), and in National Bank of Battle Creek v. Howard, 54 Misc. Rep. 81, 103 N. Y. Supp. 814 (S. Ct. 1907). Albert K. Stebbins, *Removal of Causes to United States Courts* (1924) 8 MARQUETTE L. REV. 63, 72, says, "This clause also in terms permits the removal at the instance of 'either one or more of the defendants,' which might imply that such removal could be secured upon petition of a defendant who is a citizen of the state in which the suit is pending, in the same manner as if a federal question was involved, and the right has been thus extended in several district court decisions. Such an interpretation of the law leads, nevertheless, to illogical conclusions, for there is certainly no greater reason why a resident citizen should have a right

when there are two or more defendants to a suit which is recognized as containing a separable controversy, a nonresident defendant may remove the case to the federal district court. That is, if *A*, a citizen of State *Y*, brings an action in a court of that state against *B*, another citizen of the state, and *C*, a citizen of State *X*, then if there is a separable controversy involved,[5] *C*, as a nonresident of State *Y*, may petition for the removal of the case to the federal district court and the petition will be granted. Under this procedure the case will go up to the district court to be decided there in all its phases, with *B* as a defendant as well as *C*. However, it is agreed that under the separable controversy clause *B* could not secure removal to a federal court, for he is a citizen of the same state as the plaintiff.[6]

But suppose that all of the parties, *A*, *B*, and *C*, are citizens of different states and *A* brings suit against *B* and *C* in State Z of which *C* is a citizen. *A*, of course, has the right to choose the court, state or federal, in which he will bring action. Since *C* is now a citizen of a different state than the plaintiff, would his petition for removal of the suit to the federal court be granted, even though he is a resident defendant? Would *C*, under these circumstances, have the same right as *B*? In other words, would *A* and *B* have greater rights in selecting a tribunal to try the case than are granted to *C*? Since Congress has the sole power to grant judicial powers to the lower federal courts any answer to the questions just stated must be based upon the construction to be given sentence three of Section 2 of the Removal Act, which is the pertinent statutory provision.

From the wording of the provision it would seem that *C*'s petition for removal would be granted, for it is not expressly stated that the removing defendant must be a nonresident, and from the

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to remove a cause to the district court in a case containing a separable controversy with a non-resident plaintiff than there is that he should have such right if he had been sued alone by the same plaintiff in the same court upon such separable controversy." Of course, the federal district courts will not assume jurisdiction of a case unless the jurisdictional amount conforms to the set amount required by acts of congress, especially in the class of cases here under consideration. See 28 U. S. C. A. § 41. See, also, DOBIE, FED. PROCEDURE (1928) 131-164.

[5]Stebbins, *supra* note 4, at 71-72, says, "It has, however, been held that when the person seeking removal is one of a class of several defendants, all of whom are citizens of different states than the plaintiff, then that the removal carries to the district court the entire case, even though the other defendants, similarly situated, failed to seek that relief."

[6]It seems plain in such a case *B* would not have any right to remove his case for his status would be the same as any other defendant sued in a state court by a plaintiff, resident of the same state. Yet, if there is a separable controversy, and a nonresident co-defendant removes the case, *B*'s rights would then also be determined by the federal district court, for such was the intent of the Act of 1888. See "Historical Note," 28 U. S. C. A. § 71, pp. 4-8.

statement of the case he is included in the "one or more defendants actually interested in such controversy," and is not a citizen of the same state as the plaintiff. Yet a study of the authorities and cases on the subject do not show this construction to be the accepted one, although the clause has in certain cases been so interpreted.

A case involving this question has never been finally determined by the Supreme Court of the United States, and it has been differently construed by a number of the lower federal court judges.[7] In this connection it is of interest to note that the federal district courts are given final powers of determining whether they may hear these cases. If the district court refuses the petition of a resident citizen there is no appeal from its ruling. However, it is true that if the district court once asserts jurisdiction an objecting plaintiff may appeal. Thus far the highest federal court to decide the question presented by *C* in the case above, is the Circuit Court of Appeals.[8]

One well-known lawyer, writing some years after the passage of the Removal Statute, commented as follows, concerning the confusion which this statute has caused: "In the whole field of judicial administration I know of no confusion resembling it; and in the whole field of physical analogy nothing like it except the ever-changing aspects through a kaleidoscope."[9] In regard to the Separable Controversy Clause, in particular, he wrote, "A separable controversy, otherwise fulfilling the necessary condition, (can) (cannot) be removed by a resident of the state in which the suit is brought."[10] He then referred to authorities and cases supporting each of the two conflicting points of view.

In view of this disagreement we shall try to reach a conclusion as to the proper interpretation of the Separable Controversy Clause (1) by examining the history and philosophy of the removal act as a whole and of the pertinent sentence in particular; (2) by examining the views of certain writers on constitutional law and of federal practice and procedure; and (3) by examining the decisions of the federal courts interpreting this provision. After this examination it will be our purpose to draw our own conclusion as to *C*'s right of removal in the case stated above.

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[7]See Dobie, *op. cit. supra* Note 1, at 373-74. See, also, R. M. HUGHES, FEDERAL PROCEDURE (2d ed. 1913) 337; 54 C. J. 299, § 192.

[8]Thurber v. Miller, 67 Fed. 371 (C. C. A. 8th, 1895), in the writer's opinion, and according to the view of many judges and writers, is still the most authoritative interpretation of sentence three, Section 2, of the removal statute.

[9]Boston, *supra* note 2, at 247.

[10]*Id.* at 250.

The Constitution does not in express terms give jurisdiction to any court other than the Supreme Court of the United States.[11] Whatever judicial power is exercised by the lower federal courts is derived from statutes enacted by Congress. The first of these acts was the Judiciary Act of 1789.[12] Under Section 12 of this act certain judicial powers over federal questions were given to the lower federal courts, but among them there was no provision concerned with separable controversies or removal by the resident defendant to the lower federal courts when the plaintiff was a resident of another state than that of the removing defendant.[13] The next pertinent act of Congress dealing with removals, known as the Separable Controversy Act, was enacted in 1866.[14] Under the provisions of this act "An alien defendant might remove, and a defendant, citizen of another state might remove, a suit to restrain or enjoin, whether the plaintiff was a local citizen or not; and if there were a plurality of defendants and one or more of them citizens of another state, and the suit was not for injunction or restraint, then two additional essentials to removal must exist, the plaintiff must be a citizen of the state in which the suit was brought, one or more defendants must also be citizens of the same state and one or more of them citizens of another state; in such case the non-resident citizen alone could remove."[15] This act, passed immediately after the Civil War, undoubtedly had as its purpose the extension of powers to the federal courts, nor was this extension in any wise diminished by an amendment adopted in 1867 known as the Prejudice or Local Influence Act.[16] This act

[11]See U. S. CONST. ART. III, § 1. "As provided in the Judiciary Acts, there were four occasions for exercise of the Federal judicial power as defined by the Constitution: (1) When a case was originally instituted in a Federal court of first instance. (2) When a case was originally begun in a state court having concurrent jurisdiction, but thence removed to the Federal. (3) When the Federal court of last resort, the Supreme Court, was asked to review a case decided by an inferior court, Federal or State. (4) When a case was originally instituted in the Federal court of last resort." G. A. Jaffin, *Federal Procedural Revision* (1934) 21 VA. L. REV. 504, 522-23.

[12]1 STAT. 73. See 28 U. S. C. A. § 71, "Historical Note," 4-5; Boston, *Removal of Suits from State to Federal Courts—A Survey of the Statutes* (1919) 89 CENT. L. J. 295.

[13]See 28 U. S. C. A. § 71, "Historical Note," 4-6.

[14]14 STAT. 306, 28 U. S. C. A. § 71, Historical Note," 5-6; Thurber v. Miller, 67 Fed. 371; Boston, *supra* note 12, at 301.

[15]Boston, *supra* note 12, at 295.

[16]14 STAT. 558, 28 U. S. C. A. § 71, "Historical Note," 6. This act for the first time gave the right of removal on the ground of prejudice or local influence. However, the right was confined to a "citizen of another state, whether he be plaintiff or defendant." See Edgar Watkins, Jr., *The Inadequacy of the Federal Courts as a Bar to the Removal of Suits from the State to the Federal Courts*, 99 CENT. L. J. 312, 319, "The right of removal was originated because of the idea that a person from another state could not obtain a fair trial in a court of the state in which his opponent lives. This is clearly brought out by the fact that directly after the Civil War the right of removal was greatly increased."

provided that if one party to a suit, whether plaintiff or defendant, was a citizen of the state in which the suit was brought, and the other party was a citizen of another state then the case might be removed to the federal circuit court on the ground of prejudice and such undue local influence that the party would not be able to obtain justice in the state court.

By the Revised Statutes in 1873 a uniform method of procedure was prescribed for all removals.[17] The provisions of the act of 1867, restricting the right of removal to the party who was a citizen of a state other than that in which the suit was brought were reenacted in the act of 1873. This act was followed by the act of 1875, which was designed to enlarge the jurisdiction of the circuit courts of the United States.[18] This act was said to extend "the jurisdiction of the federal courts to the very verge of the constitutional limit of the grant of judicial power."[19] It extended the right of removal to "either party or one or more of the plaintiffs or defendants," and did not restrict the right to the party or parties who were nonresidents of the state in which the suit was brought.

The passage of the act of 1875 naturally resulted in heavy dockets for the lower federal courts. In order to restrict the number of cases coming before these courts a measure was introduced in Congress in 1887 to supersede and repeal the act of 1875. It was passed, and became effective March 3, 1887.[20]

The Act of 1887, corrected in 1888,[21] is the present removal statute, and for that reason merits a special examination. It would seem that from its very inception there was confusion concerning its provisions. Although the act, when printed in the statute books, conformed to the enrollment, the enrolled act, when compared with the original papers on file in the secretary's office, con-

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[17] REVISED STATUTES (1873-1874) § 639. See 28 U. S. C. A. § 71, "Historical Note," 6-7.

[18] 18 STAT. 470, c. 137. Congress undoubtedly went to the extreme limit in the enactment of this measure, and it was the realization of this fact that led to the act of 1887-1888 which expressly repealed the provisions of the act of 1875.

[19] See 18 CONG. REC. 710, 2168, 2542, 2721, 2623, 2546, 2624, 2721, 2651, 2727, 2741, 2756 (1887).

[20] The intent behind the bill may be noted in the statement of the conferees of the House of Representatives, 18 CONG. REC. 2727 (1887), "The amendments of the Senate other than those merely verbal promote the objects of the bill, which is to reduce the jurisdiction of the courts of the United States and to regulate the removal of causes from State to Federal courts. The effect of the amendments to reduce the jurisdiction of the circuit courts of the United States, and the managers on the part of the House recommend that the House recede from its disagreement and agree to the Senate amendment."

[21] 24 STAT. 552, c. 373, corrected in 25 STAT. 433, c. 866. See 28 U. S. C. A, § 71, "Historical Note," 8.

tained twenty-five mistakes in spelling, in punctuation, in changing and omitting words, and in the structure of the bill.[22] It is difficult to find the exact intentions of the framers of the bill due to the fact that there is only a slight account in the Congressional Record of the proceedings of the Senate and the House in regard to the measure.[23] Perhaps the real intention of the framers could be ascertained only through knowledge of what took place in the committee rooms. However, the errors made when the act of 1887 was recorded in the statute books gave rise to an amendment of correction the following year.[24]

Let us examine the provisions of the act as corrected in 1888, and as it is found in the present statutes. Sentence one of Section 2 provides that, "Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction, in any State court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district."[25] The courts are in substantial agreement in interpreting this statute to mean that a resident defendant or defendants have the right of removal equally with nonresidents as long as the case comes within the original jurisdiction of the federal courts. In the cases described in the second sentence of the section there is a differentiation between resident and nonresident defendants as to their right of removal; the former, in effect, being denied the right. The second sentence is as follows: "Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction, in any State court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that State."[26] Thus, in cases brought in a state court, but which are equally within the jurisdiction of the district courts this sentence of the statute is clear in granting the right of removal to nonresident defendants. It is expressed that the right is thereby limited to such nonresidents. The situation for the plaintiff and defendants is therefore as follows: If there is a federal question involved and the case is within the jurisdictional amount the plaintiff has the privilege

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[22] 28 U. S. C. A. § 71, "Historical Note," 8.

[23] However, there was some discussion of the proposed bill by the Senate. See 18 CONG. REC. 2542-43 (1887).

[24] Senator James Z. George (Mississippi) in the first session of the 50th Congress introduced a bill to revise and correct the act of 1887 (24 STAT. 552), 19 CONG. REC. 56 (1888). See, also, 19 CONG. REC. 1728, 2558, 2651 (1888).

[25] 25 STAT. 433; 28 U. S. C. A. § 71.

[26] *Ibid.*

of electing the court in which he will take his case under the principle of diversity of citizenship. If he elects a state court the defendant, if a nonresident and the case is within the jurisdictional amount, then has the right to remove the case into a federal district court. If he is a resident, however, he does not have this privilege even though he is a citizen of a different state than the plaintiff. Exactly what the intent of Congress was in denying this privilege to a resident defendant when there is diversity of citizenship is not found in the statute, but it is generally conceded that the basic reason for the provision was the view of Congress that the state courts would be competent and not prejudiced against a resident defendant.[27] If they should be prejudiced then the resident defendant had the right to take his case, after it had been decided by the highest tribunal of the state to the Supreme Court of the United States. Of course, this restriction of the right of removal of the resident defendant was also in accord with the underlying purpose of the act of 1887-1888, which was the reduction of the number of cases coming before the lower federal courts.[28]

The third sentence of Section 2 of the Removal Statute, quoted at the beginning of this paper, omitted any reference to a restriction upon resident defendants, making the basis of removal diversity of citizenship as between the plaintiff and defendants, and actual interest of one or more of the defendants in a separable controversy. This sentence was intended to alleviate the evils which had arisen under the Separable Controversy Act of 1866. The new act restricted diverse citizenship litigation in that "the right of removal to a federal court was withdrawn from the plaintiff who initiated litigation in a state court." Also, it left questionable whether the right of removal was limited to a nonresident defendant.

The fourth sentence of the section provides: "And where a suit is brought in any State court, in which there is a controversy

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[27]"The provision of the Constitution extending the judicial power of the United States to controversies between citizens of different States had its existence in the impression, that State attachments and State prejudices might affect injuriously the regular administration of justice in the State courts." Chicago & N. W. Ry. Co. v. Whitton, 13 Wall. 270, 289, 20 L. ed. 571, 577-78 (1871). As to the right of Congress in determining the jurisdiction of the lower federal courts, see Pabst v. Roxanna Petroleum Co., 30 F. (2d) 953 (S. D. Tex. 1929).

[28]"In the first place, it has been again and again declared by the Supreme Court that the Act of 1887-1888 was designed to contract the jurisdiction of the Federal courts, both original and by removal—especially to reduce the volume of litigation which was passed into those courts by the removal under the act of 1875." C. C. Moore, *Proposed Changes in Law of Removal of Causes* (1902) 6 LAW NOTES 23-24.

between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the district court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said district court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause."[29] This sentence, like sentence two is clear in that it denies the right to a resident defendant, but confers it to a non-resident defendant or defendants.

By way of summary, therefore, Section 2 of the Removal Statute in the class of cases in sentence one grants to a resident citizen the privilege of removing a case from a state to a federal court; in the cases in sentence two it prohibits a resident defendant from removing a case from his state court. In the cases in sentence four a resident defendant is likewise prohibited from removal. Sentence three, however, is silent in so far as a resident defendant is concerned. How is sentence three to be construed? If it is construed separately from sentences two and four then it is conceded that *C*'s right in the case above is such that the district court would grant his petition for removal. If it is interpreted along with sentence two and four then it would seem highly probable that *C*'s petition would not be granted. In this connection it appears of some interest that in the unamended act of 1887 the first sentence of Section 2 included all three sentences of the act as it was corrected.[30] There was no break between sentence one and sentence two, which was clearly a mistake, and the present sentence three was separated from the preceeding clause by a semicolon. This might be an indication that it was the original intention of the framers that sentence three was to be interpreted in the same light as sentence two. Yet there may also be some ground for arguing that the Senate Judiciary Committee, in correcting the Act of 1887, reported it as three separate sentences. An examination of what records we find in the Congressional reports indicates that such was the nature of the first report on the act.[31] These are inconclusive, however, for the solution of our problem and we will now turn to the opinions of writers and jurists.

Robert M. Hughes in his hornbook on Federal Procedure (1913) takes the position that "A careful perusal of the statute

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[29]25 STAT. 433, 28 U. S. C. A. § 71.

[30]See 24 STAT. 553. See, also, Note (1887) 21 AM. L. REV. 310.

[31]18 CONG. REC. 2546 (1887).

would seem to indicate that the authorities holding any defendant, whether resident or not, entitled to remove, best accord with its language."[32] In his view the language of sentence three was plain and thus it was unnecessary to resort to rules of construction. Congress, he asserts, in varying the language in the four different sentences of the same section, "must be presumed to have done so intentionally; and it is beyond the purview of the courts to read into its act a sentence that it has deliberately inserted in one place and omitted in another." In his judgment, therefore, the defendant, whether resident or not, ought to have the right of removal on this ground. This strong position does not seem to be in accord with most of those writing upon the subject of federal practice and procedure. In one sense it is a liberal or broad interpretation of the sentence in question, for it extends the number of cases that may be removed under the separable controversy clause farther than would most of the writers. Hughes interprets sentence three separately from the other sentences of Section 2. If it was the intention of Congress that these sentences should be construed separately then there is little doubt in this writer's mind that Hughes' is the correct interpretation of sentence three. But one must not overlook the fact that it was the plain intention of Congress to restrict or limit the number of cases going before the lower federal courts.

There are only a few writers who support the position taken by Hughes in his hornbook. It would seem, however, that Charles A. Boston thought that Mr. Hughes' interpretation should be the law on the subject, although he did not so interpret the Removal Statute. Writing critically on the statute he came to the conclusion that "The confusion in administration has arisen from a neglect of historical analysis; this confusion is now so great that only a revision of the statute can be an effective remedy; and it would seem that in any such revision the guiding principle ought to be that defendants should have the same right to appeal to the judicial power of the United States for defense, as plaintiffs for attack."[33] However, he did not so interpret sentence three.

Professor Frankfurter writes that under the Judiciary Act of 1887-1888, "Only a nonresident defendant could remove," on diverse citizenship litigation. He did not express an opinion as to this point under the Separable Controversy Clause.[34] Foster in his

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[32]R. M. HUGHES, FEDERAL PROCEDURE (2d ed. 1913) 337.

[33]89 CENT. L. J. 295, 306. There is some difficulty in making a thorough historical analysis of the Removal Statute and of sentence three of Section 2 in particular. The Congressional Record throws little light upon the subject.

[34]Frankfurter, *Distribution of Judicial Power Between United States and Federal Courts* (1928) 13 CORN. L. REV. 499, 513.

work writes that a defendant, "who is a resident of the State where the suit is brought, cannot remove a separable controversy in the same."[35] But in a footnote he indicates the diversity of opinion upon the subject. Simkins asserts that "The clear purpose of the clause in the act is to permit a nonresident citizen joined with other defendants in a state court, to remove the case to the federal court, if, as between him and the plaintiff, the cause be separable; that is, the issues affecting him can be wholly determined without the presence of the other defendants."[36] Rose, in his volume on Federal Jurisdiction, does not directly consider the question, although he does make the statement that "A resident of a particular State ought not to fear that the Courts will be prejudiced against him in favor of some one who lives elsewhere."[37] Dobie writes, "The Supreme Court seems never to have passed squarely on this point. But, if the analogies of its opinions on the fourth sentence of Section 28 mean anything, they spell a resolute determination that the restrictive purpose of the act of 1887-1888 must not be defeated by either literal interpretations or careless and slipshod legislative draftsmanship."[38] M. J. Hughes in his work on Federal Practice and Procedure evades the question somewhat. He says, "A cause, in which there is a resident as well as a nonresident defendant, cannot be removed unless the controversy as to the nonresident defendant is separable from that against his resident co-defendant."[39] Most of the other authorities consulted either took the view that a resident defendant can not remove the case under the Separable Controversy Clause when the plaintiff is nonresident or inferred that this is the more acceptable of the two conflicting viewpoints. In other words, they interpreted the third sentence as being in accord with the second and fourth sentences, both of which deny the right of removal.[40]

With but one exception this interpretation seems likewise to have been the one adopted in the decisions of the lower federal courts. *Stanbrough v. Cook*,[41] the contrary decision, was ren-

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[35] 2 FOSTER, FEDERAL PRACTICE (5th ed. 1913) 1788, § 541.

[36] SIMKINS, FEDERAL PRACTICE (Rev. ed., John Schweppe, 1934) 322, § 409.

[37] ROSE, FEDERAL JURISDICTION AND PROCEDURE (4th ed. 1931) § 361, 385.

[38] DOBIE, FED. PROCEDURE (1928) 374, § 95. Dobie says further, at 373: "This question has given rise to a serious conflict of opinion. Those courts which are influenced by the literal interpretation of the words of the statute, when the other requirements are present, give the right of removal to defendants who are residents of the state in which the suit is brought. Other courts, which construe the statute in the light of its philosophy, history, and purpose, insist that only non-resident defendants can here remove. It is believed that the rule limiting the right of removal to non-resident defendants is the better view."

[39] 4 HUGHES, FEDERAL PRACTICE (1931) 161, § 2362.

[40] See Stebbins, *supra* note 4, at 63, 71-73.

[41] 38 Fed. 369 (C. C. N. D. Iowa, 1889).

dered soon after the passage of the act of 1887-1888, when the Removal Statute and in particular sentence three of Section 2, came up for construction. Briefly, the facts were as follows: *A*, a citizen of New York, brought an action in Iowa for the recovery of the immediate possession of certain realty and damages for injury to buildings and for the conversion of crops. *B* and *C*, citizens of Iowa and Vermont respectively, were made defendants. *B*, as a resident citizen of Iowa, petitioned the circuit court for the removal of the case to the federal circuit court. The facts were sufficient to present a separable controversy. Circuit Judge Shiras was thus presented with the question whether under the circumstances a resident defendant had the right of removal. The court looked to the language of sentence one and three and thought that both should be construed separately from the other sentences of Section 2. Setting sentence three apart from the rest of the section the court reasoned that it could not be held that resident defendants would be denied the right of removal if the plaintiff was a resident of another state. Any other meaning, it was asserted, would result in the court's interpolating the words "being a non-resident" into the third sentence. In support of its view the court pointed out that each of the four sentences in Section 2 deals with different classes of cases, "and each clause defines by its terms by whom the right of removal may be exercised in the cases coming within the purview of each clause, and the court is not justified in adding to any of the several clauses restrictions upon the right of removal not found in the clause itself, on the ground that thereby the construction of the clause will be conformed to the true intent of Congress."[42] One may question, however, whether this last statement really expresses a policy of construction generally followed by the court. The writer believes not. Yet the court's reasoning as to the special nature of the four sentences of the Removal Statute, each of which defines a general class of removal cases, apparently seems sound. There is little doubt, if one takes sentence three separately from the other sentences that the court adopted an interpretation in accord with the "plain intent and meaning of the language used." Therefore, in the words of the court, "cases coming within the third clause—that is, suits involving a separable controversy wholly between citizens of different states—are removable by any one or more of the defendants actually interested in such separable controversy."[43] This being so the court came to the conclusion that "a removal may be had by any one of the defendants interested in such separable con-

[42]38 Fed. 369 (C. C. N. D. Iowa, 1889).
[43]*Id.* at 372.

troversy, irrespective of the question of the residence or citizenship of such defendant."[44]

The first case construing the third sentence was thus a decision upon the sentence considered separately from the remainder of the statute. Consideration of the other sentences was only incidental, as when the court looked to the intent of Congress in sentence one in support of its construction of sentence three. It is apparent from an examination of the decision that the court followed primarily a limited or narrow construction of the Separable Controversy Clause rather than looking to the history of the statute or the general intent of the framers of its provisions.

Perhaps the only support which has been given to this case is to be found in a decision of a New York court[45] and in the hornbook mentioned above.[46] Circuit Judge Shiras and Hughes both take a strong stand that the defendant has the same right as the plaintiff if he is a resident of a different state from the plaintiff. Although this is not the interpretation which most authorities place upon the statute it would seem that in perfect fairness to a defendant he should have the privilege of removal to a federal court since the plaintiff may elect the court in which he will bring action. However, statutes are not interpreted from a moral viewpoint only.

Several years after the above decision of Judge Shiras the pertinent clause of sentence three was brought before the circuit court of appeals in the case of *Thurber v. Miller*.[47] The plaintiff was a citizen of New York, and the defendant, on whose petition the case had been removed from the state court to the federal court, was a citizen of South Dakota—the state in which the suit was brought. There was little doubt but that the case involved a separable controversy. So that the question was whether a resident defendant had the right of removal. The decision of the court was delivered by Judge Caldwell. In tracing the development of the federal law on separate controversies he asserted that removal on this ground "was first provided for by the act of July 27, 1866 (14 Stat. 306, c. 288). That act gave the right of removal to 'the defendant who is a citizen of a state other than that in which the suit is brought.' The provision of the act of 1866, that the defendant authorized to remove a suit upon the ground of a separable controversy must be a citizen of a state other than that in

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[44]38 Fed. 369 (C. C. N. D. Iowa, 1889).

[45]National Bank of Battle Creek v. Howard, 54 Misc. Rep. 81, 103 N. Y. Supp. 814 (S. Ct. 1907).

[46]R. M. HUGHES, FEDERAL PROCEDURE (2d ed. 1913) 337.

[47]67 Fed. 371 (C. C. A. 8th, 1895).

which the suit was pending, was in harmony with the rule that had always obtained with reference to the citizenship of a defendant in removing a cause from a state to a federal court."[48] Judge Caldwell pointed out that under the Judiciary Act of 1789, a defendant when sued in a court of his own state by a citizen of another state could not remove the suit. In accordance with that act the defendant could remove only when he was sued in the courts of a state of which he was not a citizen. He then explained that under the Local Prejudice Act of 1867 the right of removal was extended to "such citizen of another state, whether he be plaintiff or defendant," and that this was re-enacted and carried into the Revised Statute of 1873-74.[49] He criticized the act of 1875, which still further enlarged and extended the judicial powers of the federal courts by extending the right of removal to "either party or one or more of the plaintiffs or defendants," and thus made no pretense of restricting the right to a nonresident party to the suit.[50] The circuit judge thought that this act extended the judicial power of the federal courts "to the very verge of the constitutional limit of the grant of judicial powers."[51] However, it was repealed and superseded by the act of 1887-1888.

Judge Caldwell was of the opinion that the act of 1887-1888 restored the rule of the Judiciary Act of 1789 "as relates to the party who may remove the suit, by restricting the right of removal to 'the defendant or defendants.' "[52] He drew attention to the prohibition against resident citizens in clauses two and four and concluded that, "While this restriction is not found, in express terms, in the third clause, relating to the removal of suits in which there shall be a controversy which is wholly between citizens of different states, it is plainly implied, and what is implied in a statute is as much a part of it as what is expressed."[53] He reasoned that when a defendant is sued alone in a court of the state of which he is a citizen, by a citizen of another state, and the causes of action are such that the suit might properly have been brought against him and another if the plaintiff so elected, "he confessedly cannot remove the suit." By analogy it was thought that when the suit is brought on these same causes of action against defendant and another by the same plaintiff, "in which there is—as there must be to give the right of removal at all—a controversy wholly between him and the plaintiff, what possible reason can be suggested why he should have the right to remove that controversy

[48] Thurber v. Miller, 67 Fed. 371 (C. C. A. 8th, 1895).
[49] *Ibid.*
[50] *Id.* at 376.
[51] *Ibid.*
[52] *Ibid.*
[53] *Ibid.*

for trial into the circuit court in the one case, and the right be denied to him in the other."[54] Such was held not to be the intention of Congress, especially since the main purpose was to restrict the judicial powers of the lower federal courts.

The reasoning in *Thurber v. Miller* was followed, by way of dictum, in *Wrightsville Hardware Co. v. Hardware & Woodenware Mfg. Co.* et al.,[55] in which the plaintiff, a Pennsylvania corporation, brought an action against the Hardware & Woodenware Mfg. Co. and three individuals, two of whom were residents of New York and the third a resident of Vermont. Although the case was held to be one in which there was not a separable controversy, Judge Lacombe said, "Crandell, being a resident, cannot remove. When the right to remove is doubtful, the doubt is resolved in favor of a remand."[56] Since this case did not decide the particular point perhaps the comments of the circuit judge lend little weight to the view presented in the leading case of *Thurber v. Miller.* However, in *Whitaker* et al. *v. Coudon* et al.,[57] in which case the plaintiffs were citizens of New York, South Carolina, Delaware, and West Virginia, respectively, and the defendants were citizens of Maryland, West Virginia, and Washington, respectively, Judge Rose of the Maryland federal district court followed the opinion of Judge Caldwell in *Thurber v. Miller,* which he asserted overruled Judge Shiras' opinion in *Stanbrough v. Cook.* Judge Rose came to the conclusion that "It is perfectly clear that a resident of a state in whose courts he is sued, if made a sole defendant, cannot remove. I cannot conceive that Congress could have intended to allow him to do so merely because it so happened that some one else, who could not remove or who did not want to, was made a co-defendant with him."[58] Thus the holding and reasoning in this latter case followed the early opinion of Judge Caldwell in *Thurber v. Miller.*

Presented with the same question of the right of removal by a resident defendant when there is a separable controversy and the plaintiff is a nonresident, district Judge Thacher in 1927, asserted that *Stanbrough v. Cook* "was overruled in the Circuit Court of Appeals for the Eighth Circuit in *Thurber v. Miller,* 67 F. 371, which has been followed in *Wichita National Bank v. Smith* (C. C. A.) 72 F. 568; *Monroe v. Williamson* (C. C.) 81 F. 977; *Drovers' Deposit Nat. Bank v. Tichenor* (D. C.) 202 F. 1031; *Whitaker v. Coudon* (D. C.) 217 F. 139 . . . It has the support of high authority, which has not been questioned, and should be followed in

[54] Thurber v. Miller, 67 Fed. 371 (C. C. A. 8th, 1895).
[55] 180 Fed. 586 (C. C. S. D. N. Y. 1910).
[56] *Id.* at 588-89.
[57] 217 Fed. 139 (D. C. D. Md. 1914).
[58] *Id.* at 141.

this court."[59] The same question was presented as late as 1928 in *Rand v. Hercules Powder Co.* et al.,[60] in which district Judge Hazel held that "Although sentence 3 relates to a controversy wholly between citizens of different states, and one fully determinable between them, and it contains no mention of nonresidence, it nevertheless has been interpreted as implying that a resident petitioner cannot remove a separable controversy to this court from a state court, and that the requirement of the second sentence as to nonresidence also applies to the succeeding clause."[61]

It seems that *Thurber v. Miller* has been followed in every decision of the lower federal courts involving the same question. Likewise, with only a few exceptions, writers on federal procedure and judges have adhered to Judge Caldwell's opinion in that case. There has been only one decision which has directly followed Judge Shiras' opinion in *Stanbrough v. Cook* and that was a state court decision. Thus in an examination of the decisions there appear to be two distinct views: (1) that when there is a separable controversy a resident defendant, under sentence three, may remove if action is brought against him by a resident of another state; (2) that the resident defendant under these circumstances may not remove. The weight of authority, both of case law and writers on federal practice and procedure, appears to support the second position and undoubtedly this view is the generally accepted one at present. Even though the Supreme Court of the United States has not decided this particular question it would seem that if such a case should ever reach that tribunal the Court would follow Judge Caldwell's opinion in *Thurber v. Miller*. His is a logical opinion, and follows a system of reasoning which looks to a broad construction of the third sentence, in that the sentence is considered in its relation to the other provisions of Section 2 and in accord with the intention of Congress and previously enacted removal measures.

It would seem that Judge Caldwell's opinion is the correct one, especially since the act of 1875, which had for its purpose the

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[59]Visayan Refining Co. v. Standard Transp. Co., 17 F. (2d) 642, 645 (S. D. N. Y. 1927). The Standard Oil Co. of New York, independently of the other defendant, claimed the right to remove its case upon a separable controversy under Section 2, sentence three, of the Removal Statute. The plaintiff was a resident of another state than that in which the suit was brought. Action was brought in the state courts of New York. The defendant Oil Company relied upon the decision of Judge Shiras in Stanbrough v. Cook, *supra*. However, the federal district court disregarded the holding in that case.

[60]28 F. (2d) 131 (S. D. N. Y. 1928). Here the plaintiffs were citizens of Rhode Island. The defendant, petitioning to remove, was a citizen of New York. It seemed plain from the statement of facts that there was a separable controversy presented.

[61]28 F. (2d) 131, 132.

extension of the powers of the federal courts, was expressly repealed by the act of 1887-1888, which greatly limited the jurisdiction of these courts. If records of the judicial committees and of the conference committees of the Senate and the House of Representatives were available, additional light might be thrown on this sentence, which might lead to a new interpretation. As it is, the sentence is ambiguous so that the lower federal courts have been obliged to step in, in order to clarify the uncertainties of the Removal Statute.[62] As long as the ambiguous parts of the Removal Act are not changed it would seem safe to follow the excellent opinion in *Thurber v. Miller;* that is, as long as the inferences in that case can not be disproved through a thorough historical study of the philosophy and intent behind the removal of cause under the separable controversy provision.

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[62]See Watkins, *supra* note 16, at 319, "The present-day tendency is to cut down the right of removal along with the jurisdiction of the federal courts in matters of no great importance. As can be seen by the recent cases the federal courts are doing all in their power to find ways to deny the right of removal so as to lessen their work, and the original idea of prejudice against foreigners and citizens of other states is being forgotten, except in criminal cases against revenue officers."

LEGAL CONTROL OF PARTY ORGANIZATION AND POWERS IN MISSISSIPPI

*Nolan Fortenberry**

The past four decades have witnessed an increasing conviction on the part of American legislators that political party organization is a proper subject of state control. While the growth of regulation in this field has been quite extensive, certain states, notably the one-party governments of the South, have lagged behind both in quality and effectiveness of such legislation.[1]

The proper functioning of the internal mechanism of political parties is important in any commonwealth. But it is of vastly greater moment in a state that is dominated by a single party, for in such a state the party primaries are to all practical purposes the elections and the party machinery is, in effect, the government. Consequently the legal regulation of party affairs becomes of prime importance, being the only means by which the state exercises any real control over the electoral process.

It is the purpose of this paper to treat the legal regulation of party organization and powers in a typical one-party state.[2] An attempt will be made: (1) to survey the growth and development of legislative control over party machinery; (2) to offer an analysis of the objectives and application of this legislation; (3) to present some observations concerning the phases of organization that have not yet felt the restraint of statutory control.

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[1]It may be noted that Florida, with eight separate statutes, has enacted more laws on the subject than any other southern state. See Fla. Laws 1901, pp. 160-165; 1903, p. 242; 1905, p. 168; 1907, pp. 93-95; 1913, pp. 242-268; pp. 269-270; 1929, p. 482; 1935, pp. 477-480. Illinois and South Dakota, on the other hand, have enacted nineteen and fourteen measures, respectively, that may be called separate statutes. Ill. Laws 1885, pp. 188-193; 1889, pp. 140-148; 1891, pp. 107-122; Spec. Sess. 1898, pp. 13-34; 1889, pp. 211-215; 1901, pp. 173-198; 1903, pp. 176-177; 1905, pp. 213-234; Spec. Sess. 1906, pp. 436-466; Spec. Sess. 1909-10 pp. 50-52; 1911-12, pp. 43-45; 1913, pp. 310-330; 1919, pp. 477-484; 1921, pp. 433-434; 1919, pp. 511-512; 1927, pp. 462-465; 1929, pp. 410-411, 420-421; 1935, pp. 807-809. S. D. Laws 1891, pp. 152-156; 1905, pp. 147-151; 1907, pp. 306-308; 1909, pp. 479-482; 1911, pp. 251-288; 1915, p. 556; 1916-17, pp. 320-375; 1919-20 (Ex) pp. 71-82; 1921, pp. 448-449; 1923, pp. 161-169; 1925; pp. 167-168; 1927, pp. 131-136; 1929, pp. 124-141; 1933, p. 95. Part of this may be explained by the repeated unconstitutionality of the laws in Illinois, and experimentation with the unique "Richards Primary" in South Dakota. See an initiative measure of 1911, S. D. Laws 1911, pp. 251-288, and S. D. Laws 1915, p. 556. For a discussion of this see C. A. Berdahl, *The Richards Primary* (1920) 14 Am. Pol. Sci. Rev. 93-105.

[2]The Democratic party has been in complete control of the state government in Mississippi since the resignation of Governor Ames on March 28, 1876. 2 Rowland, History of Mississippi (1925) 206 *et seq.*

I.

The course of legislation on party organization in Mississippi reveals a general trend toward more effective control. Though long periods have elapsed without changes there has been a gradual, though unmistakable, increase in the power of the state over party government. The Constitution of 1890, under which the commonwealth still operates, contains only this reference to political parties: "The legislature shall enact laws to secure fairness in party primary elections, conventions, or other methods of naming party candidates."[3] Complying with the mandate of this section, the legislature of 1892 enacted a code with a loosely-drawn chapter which purported to regulate in a comprehensive way the party machinery.[4] But it is evident upon close inquiry that this measure was a perfunctory step in the process. Though its provisions extended to the most important units of party government—state, judicial, congressional, and senatorial districts, and county—the control was only nominal.

The statute specified the number and method of selection of members of state and district conventions, but county party organizations were left free to select convention delegates as they desired except that the method be "fair and equitable" and provide for proportional representation of factions. The permanent part of the party machinery was largely unregulated. State and district committees were to be chosen by state and district conventions but county committees were to be chosen as the county desired, though popular election was made possible.[5] Full control over the nominating process was allowed the party conventions, the committees to exercise such authority as was delegated. Such powers as the determination of qualifications for party membership, the filling of vacancies in their own membership, the ordering of primary nominating elections and the settlement of contested primary nominations, were assured to the party committees. The supremacy of the state committee over lower committees was provided for by allowing this body to arrange for a special election of a county committee when two local groups claimed recognition.[6]

Any hope of effective control was defeated, particularly by the freedom allowed the state conventions and the slight control of the

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[3]MISS. CONST. 1890, art. 8 § 247.

[4]Miss. Laws 1882, pp. 148-150. Mississippi was the first southern state to enact a law regulating party organization.

[5]Section 2 of this act provided that when one-fifth of the qualified electors so petitioned an election should be held. Thirteen committeemen were to be chosen, two from each supervisor's district and three at-large. Each voter was to vote for five names and the three highest at-large candidates and the two highest district candidates were to be declared chosen.

[6]Miss. Laws 1882, §§ 1-8.

entire county set-up, and the early act did little to curb the power of political bosses and the trading in nominations. It was but natural, therefore, that public sentiment should demand stricter regulation of the party machinery in order to secure more satisfactory nominating methods.

In 1902 the Noel bill was enacted into law, carrying the basic provisions of the present system of regulation and following the general trend in party regulation then current in the United States.[7] This act extended the control of the state to include slight regulation of county conventions and committees and provided for stricter regulation of the state and intermediate units of the party system. State conventions, composed of delegates chosen by local party conventions were allotted the duties of choosing the state central committees, delegates to national conventions, and candidates for the office of presidential elector. But the law set the number of members of the state committee and the term of office. County conventions were required to meet every four years with delegates equally apportioned among the supervisors' districts. Though these conventions chose the county committees the law set the number of committeemen and their term of office. In judicial and congressional district committees, chosen by direction of the executive committees in the counties composing such districts, internal practice was regulated—the law providing that one member might cast the vote of the entire delegation or that proxies might be used when no member was present. A quorum was defined as a majority of the representative vote of the committee.[8]

But the greatest step in the 1902 act was the provision that all nominations must be by primary election, thus removing from the party authorities the option of the method of nomination.[9] This provision took from the organization its most important power and gave a democratic flavor to its functions.[10] The county executive committee was made the authority for arranging nominations with power to investigate and decide in a judicial manner the alleged violations of the law, such action on contests to be reviewable by the state committee.[11]

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[7]Miss. Laws 1902, pp. 105-112.

[8]*Id.* § 2. Senatorial and flotorial district committees were mentioned, to be chosen as the judicial and congressional committees with each county to have equal representation. Other committees were to have twice the membership of the county in the House of Representatives.

[9]*Id.* § 1.

[10]In McInnis v. Thames, 80 Miss. 617, 32 So. 286 (1902) the supreme court upheld the constitutionality of this law as authorized by Section 247 of the Constitution of 1890.

[11]Miss. Laws 1902, § 14. This section was omitted by the Code of 1906.

The act of 1904 and the Code of 1906 did not materially affect the party organization of the state.[12] An omission in the Code of the section relating to investigation of primary law violations, and subsequent litigation over the matter, led to an act of March 21, 1908, which set forth clearly the procedure to be followed in case a nomination was to be contested in either state, district, or county elections.[13] The right of contest was provided for any aggrieved person, the committee to deliberate and decide the true nominee by majority vote. The committee hierarchy was also recognized in this act in the provision that the chairman of a higher committee might, with the advice of two members of said committee, issue a fiat to the chairman of the county committee to require this group to investigate the alleged irregularity in a state or district contest that occurred in the particular county.[14]

In 1910 the scope of legal regulation was expanded to provide for the election by popular vote of municipal executive committees.[15] The size of such committee was fixed at the number of "legislative officers" of the municipality.[16] This committee was given full power to control municipal primary nominations as well as the authority to fill its own vacancies. This was the first, and only, party committee whose selection by popular vote was made mandatory by legislative act.[17]

The task of nominating candidates for United States Senator was the only new duty conferred upon party organs by the act of 1912,[18] while an act of 1916 required the state executive committee to provide for the nomination of judges of the supreme court.[19] Two further acts passed in 1928 gave county committees the authority to control the nomination of levee commissioners,[20] and made it possible for the proper executive committee to declare all nominees thirty days before the primary if only one candidate had filed.[21]

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[12]The act of 1904 regulated the notice to be given and the hour for precinct conventions. See Miss. Laws 1904, p. 179.

[13]Miss. Laws 1908, pp. 140-141.

[14]In 1930 the number of advising members was increased to four. Miss. Laws 1930, p. 594. But see later act of 1935.

[15]Miss. Laws 1910, pp. 211-212.

[16]This apparently refers to city councilmen.

[17]The provision concerning the possible election of county committees by popular vote in the 1892 act was carried into the 1902 act but made a matter for the committee to decide in the act of 1904, Miss. Laws 1904, p. 179.

[18]Miss. Laws 1912, p. 309.

[19]Miss. Laws 1916, p. 224-226.

[20]Miss. Laws 1928, p. 16-19.

[21]*Id.* p. 172. Sixty days' notice was required in case of candidates for Congress. This act changed the provision for fifteen days' notice in the 1904 act.

In 1935 the Mississippi legislature, meeting in extraordinary session, brought the regulation of party affairs to its present stage.[22] Passing over the various other phases of party machinery this act dealt with the powers of party committees, definitely limiting them in the matter of deciding nominations. This measure was a new step in legal control and showed a complete change in the attitude of the legislature toward the authority of party organs to control their own affairs.

Thus, step by step, legal regulation has developed until most of the major phases of the party machinery have been covered. The nature of this control will next be examined.

II.

Any conclusions based upon existing laws without taking into account the operation of those laws in actual practice, would be hazardous. This is especially true in regard to legislation on political parties, where the law is often stretched, twisted, or openly ignored. Because the facts on actual operation of the Mississippi statutes on parties are not yet collected, this treatment will be from the legal standpoint.

A. Conventions

The convention branch of the party machinery is a hierarchy consisting of three divisions—state, county, and county precinct. The original act of regulation, passed in 1892, envisaged congressional and other state district conventions but these were not mentioned in the act of 1902 and subsequent measures. The act of 1904 was the first to specify county precinct conventions.[23]

All conventions are required by law to meet quadrennially, though the exact date and places are not specified other than the requirement that the county committee give "at least ten days' notice for the precinct elections, on which date the electors of such precinct shall meet at 10 o'clock A. M. at the usual voting place."[24] The composition of conventions is under some control. The number of votes in the state conventions is fixed, each county being entitled to "a number of votes equal to double its representation in the house of representatives."[25] In county conventions the number of delegates is to be designated by the county committee though the law requires that delegates be apportioned equally among the supervisors' districts of each county, or in proportion to the votes

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[22]Miss. Laws Ex. Sess. 1935, pp. 33-52.

[23]See Miss. Laws 1902, pp. 106-107; Miss. Laws 1904, p. 179.

[24]Miss. Code Ann. 1930, § 5866. The act of 1892 specified the number of days' notice for each convention. See Miss. Laws 1892, pp. 148-150.

[25]This scheme of representation dates from the 1902 act.

cast for the party candidates at the preceding presidential election. Precinct conventions are mass meetings of all electors of the precinct. The requirement of secret voting in the precinct meetings is the only regulation of internal procedure in any convention.

The most important duty of state and county conventions is the selection of the respective executive committees. However, the naming of delegates is a required function of all three meetings and the state convention has the added task of nominating presidential electors. The power of conventions to proceed in their own way is subject to little legal restraint. In reality, however, each convention is restrained by the existing executive committee by which it is called.

The extent to which this control goes is illustrated in the case of *Howard v. Sheldon*.[26] Here, the courts were asked to enjoin the holding of conventions and the election of delegates to them on the ground that the state committee, in ordering these elections and conventions, had violated the primary election law. The supreme court denied the injunction granted by a lower tribunal on the ground that the courts had not expressly conferred jurisdiction over party elections or conventions.[27]

Conventions are of importance in the present party set-up chiefly because of their function of choosing executive committees. Further regulation would thus be an indirect method of controlling the more important part of the party machinery.

B. Committees

The law provides for five different kinds of committees. Of these the municipal executive committees are not important, having only local municipal duties and being outside the regular committee hierarchy. Senatorial and flotorial[28] district committees are not of great importance because of the light duties imposed upon them. Consequently the state and county committees are the principal parts of the system.[29]

(1) *Selection.* Members of state and county committees are chosen by state and county conventions as provided in the act of

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[26]151 Miss. 284, 117 So. 839 (1928).

[27]The court pointed out in this opinion that the practical effect of granting such injunction could not be ignored as the resulting delay would make the conventions so late as to be useless for choosing delegates.

[28]This refers to districts that are composed of more than one county that elect a "floater representative" to the legislature. The word is not generally used and is not found in standard dictionaries. For a discussion see A. Z. Reed, *Territorial Basis of Government Under the State Constitutions*, 40 Columbia Univ. Studies 553.

[29]Judicial and congressional district committees, mentioned in earlier acts are omitted from the Code of 1930.

1902. Senatorial and flotorial district committees are chosen in any manner to be prescribed by the executive committees of the counties composing the district. Prior to the act mentioned there was no regulation of the selection of county committees other than a provision for popular election upon petition of one-fifth of the qualified voters of the county.[30] But this law provided the present method of choosing the committee and an act of 1904 made popular election possible only when so ordered by the committee itself.[31] The power to select members to fill vacancies is assured to all committees, subject to the provisions that the new members of state and county committees come from districts where the vacancies occurred.

(2) *Composition.* State committees are composed of three members from each of the seven congressional districts,[32] while county committees are made up of three members from each of the five supervisors' districts within the county. The size of flotorial and senatorial district committees is unregulated except for the provisions that the counties shall have equal representation. All committeemen are chosen for a four-year term.[33] The procedure of state and county committees is unregulated, but in district committee meetings the vote of an entire county may be cast by any member present and proxies are legal in case of the absence of all members of a county delegation.

(3) *Powers and Duties.* The powers of committees over the activities and functions of the party are extensive, and, until recently, have not been hampered by legal restrictions. Most of the legislation of the past forty years may be said to have been a protection to, rather than a restriction of, such powers.

Under the first regulatory act full power of control of any primaries, including the power to determine qualifications for voting, was assured to party committees. Since the 1902 act, however, committees have been subject, with some notable exceptions, to the general election laws, the provisions being that county committees "shall discharge all the functions imposed upon county election commissioners, except revising registration and poll books, and shall be subject to all penalties."[34]

The requirements for voting are set forth in the general election law,[35] and the primary law enacts these qualifications and the

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[30]See Miss. Laws 1892, § 2, pp. 148-150.

[31]Miss. Laws 1904, § 1, pp. 178-179.

[32]These committeemen are chosen by the delegates from the different congressional districts, each district acting separately.

[33]The term of municipal executive committeemen corresponds to the dates of the general municipal election.

[34]MISS. CODE ANN. 1930, § 5864.

[35]*Id.* §§ 6207, 6208.

additional requirements that the person must have voted no other party ticket for two years and intends to support the party nominees in the ensuing election. But a person may be excluded by "any regulation of the state executive committee of the party holding such primary."[36] This provision, in effect, makes the state committee the final authority on the matter of suffrage, since party primaries have long been the only elections of importance in Mississippi.

The control of campaign expenditures and practices is removed from the hands of the party committees, the law applying directly to the candidates themselves. The dates of primaries and the general conduct of them are specified in the law. County committees are required to appoint primary election managers that are distributed, as far as practicable, "between the supporters of the candidates for those offices about which there are leading contests," and failure to make such distribution is made a misdemeanor.[37] The prerogative of filling vacancies in nominations does not belong to executive committees in Mississippi. The county committee is, furthermore, required to meet "on the first or second day after each primary election" to receive and canvass the returns, investigate any irregularities, and announce the nominees.

Upon complaint of an irregularity in a state or district nomination the chairman of the state committee is required to issue his fiat to compel the committee of the county where the alleged irregularity occurred to investigate and report their findings to him.

Yet, with all this regulation there had never been, until 1935, any legal restraint upon the power of committees to be the final authority on nominations.

The courts have carefully guarded this power of party committees. In 1903, the supreme court was called upon to decide whether or not under a statute of 1902, requiring county committees to investigate irregularities in primaries, mandamus would lie to compel a committee to re-assemble and review its conclusions in the light of the alleged ineligibility of a nominee.[38] But this tribunal was firm in its refusal, setting forth that such use of the writ would be "not to compel action but to control discretion in acting." Apparently the court interpreted the statute to mean

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[36] MISS. CODE ANN. 1930, § 5887.

[37] *Id.* § 5873. This section attempts to give candidates in primaries the same protection that is afforded candidates in elections in a two-party state. For example, see ILL. REV. STAT. c. 46, §§ 31-33.

[38] Brewer v. Abbey, 82 Miss. 559, 35 So. 153 (1903). The court also pointed out in its opinion that such protest came too late, being filed after the meeting of the committee.

that the committee could investigate and correct wrongs in its own way and at its own convenience.

Though the section of the statute requiring investigation and correction of wrongs was omitted from the 1906 Code, the high court refused, in two cases before it in 1907, to interfere in nomination contests, despite the provision of the law that the election laws would apply to primary elections except where otherwise stated in the act. In *Ramey v. Woodward*[39] the court refused a litigant in a primary contest the trial by jury provided for contests in general election stating that no specific provision existed for the court to entertain such a suit, that being a party affair over which the courts had no jurisdiction. In *State v. Brown*[40] the courts were again asked to issue mandamus compelling a committee, after the nominees had been announced, to re-assemble and investigate an irregularity. But the court reaffirmed its earlier view that the party committee was the "sole arbiter" of contested nominations.

These cases indicate the nature of the power of party committees to control primary nominations. The firm refusal of the courts to interfere with the entire process of nomination was probably one of the reasons for the sweeping provision of the Corrupt Practices Act of 1935, which took from the committees this important power. The language of Section 15 of that act is unmistakable:

> "When and after any contest has been filed with the county executive committee, or complaint with the state executive committee, and the said executive committee, having jurisdiction, shall fail to promptly meet or having met shall fail or unreasonably delay to fully act upon the contest or complaints, or shall fail to give with reasonable promptness the full relief required by the facts and the law, the contestant shall have the right forthwith to file in the circuit court of the county wherein the irregularities are charged to have occurred, or, if more than one county to be involved then in one of said counties, a sworn copy of his said protest or complaint, together with a sworn petition, setting forth with particularity wherein the executive committee has wrongfully failed to act or to fully and promptly investigate or has wrongfully denied the relief prayed by said contest, with a prayer for a judicial review thereof. . . . "[41]

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[39]90 Miss. 777, 44 So. 769 (1907).

[40]90 Miss. 876, 44 So. 769 (1907). Chief Justice Whitfield, in a concurring opinion, pointed out that any opposite construction would nullify the primary laws because the three weeks allowed by the law between the primaries was insufficient for court action.

[41]Miss. Laws Ex. Sess. 1935, pp. 33-52.

A prompt and unbiased investigation is provided by the employment of a circuit judge from outside the district where the alleged irregularity occurs with full power of a judge in chancery in term time. Provision is further made in this same section for appeal from the trial judge to the supreme court. All such court action is specifically regulated with the days allotted so that the investigation may be conducted between the dates set for first and second primaries. But the writ of *quo warranto* is provided to effect the removal of any officer nominated by a party primary when such nomination is contested and has not been settled before the person enters upon his duties of office.[42]

Although the portion of the act relating to this power of the courts to interfere with the deliberation or derelictions of party committees appears to be especially designed for contested nominations, there is no such restriction of its scope. The act applies to "any contest" and the courts can apparently be called upon to review any committee action or refusal to act. The importance of the committees in the party machine makes this broad regulation highly significant.

III.

The foregoing discussion indicates certain definite legal restrictions that have been placed upon party organization and powers by legislative measures enacted over a considerable period of the state's history. But it is not difficult to point out parts of the system wherein the regulation is still either wholly lacking or quite inadequate.

Mississippi, unlike most states of the southern group, provided that party executive committees shall be chosen by delegate conventions.[43] And while these committees have been regulated from time to time, the conventions, with the all-important power

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[42]In thus lending the authority of the courts to the settlement of contests arising over party nominations, Mississippi joins four other one-party states of the South giving the courts some review of the functions and conclusions of party committees. As early as 1909 Texas gave the contestant over a nomination the right of appeal to the district court. Tex. Laws 1909, pp. 451-454. See, also, an act of May 27, 1931, Tex. Laws 1931, pp. 395-396. In 1914 Virginia gave her courts such jurisdiction over the nominees of primaries. Va. Acts 1911, pp. 513-525. Arkansas, on November 7, 1916, in an initiative measure conferred upon any candidate the right to contest a certificate of nomination made by a county central committee in the courts. ARK. STAT. (Kirby & Castle, 1917) pp. 2287 ff. In 1922 Louisiana passed an act giving candidates in primaries the right of appeal to the courts. La. Acts 1906, pp. 178-202.

[43]Florida and Louisiana provide for popular election of all important executive committees. La. Acts 1906, pp. 79-80; Fla. Acts and Resolutions 1913, pp. 242-268. In Texas and South Carolina a partial use of the convention method of selection is found. See Tex. Gen. Laws 1905, pp. 520-565; S. C. Acts 1915, pp. 169-175. In Virginia, Alabama, and Georgia the selection of committeemen is wholly unregulated.

of selecting the committees, have received little legislative attention.

The law provides that "a state convention shall be held" every four years and specifies its main duties. But the date and the entire internal procedure of the convention are unregulated, being left to the direction of the state committee or to the convention itself. The county conventions are more completely without the reach of the law. Only the precinct conventions, called by the county committees, are regulated as to number of days' notice and the method of voting. These omissions of the law, leaving the conventions almost entirely subject to the executive committee, make it possible for a committee system to arrange practically at will the meetings at which the succeeding committees are to be chosen. By clever manipulation of the arrangements—the posting of notices in obscure places, advance notification of henchmen in the different precincts, the hasty or delayed summoning of delegates—a county convention could be arranged that would be entirely under the control of the existing county executive committee. And such a convention could send delegates to the state convention to choose a state committee of the same political markings. It is thus conceivable that a committee system, once in control of a political faction, could virtually choose its own successors and become self-perpetuating.[44]

Although this menace of committee obligarchy may be more apparent than actual,[45] such a development is not at all unlikely—especially within the county units.[46] It is also true that a committee system under the domination of one political faction, despite the safeguards thrown about the primary elections by the 1935 act[47] could do much to prevent honest nominations. Stricter regulation of conventions or the substitution of popular election of committeemen would remove this possible danger.

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[44]The remedy that citizens have in such a case of a "managed" convention is to hold a separate county convention. The credentials committee of the state convention then decides which delegation is entitled to be seated. Likewise the state committee may recognize a different county committee where the existing group is shown to have been fraudulently elected. This remedy seems inadequate for two reasons. First, the people of a county would rather tolerate high-handedness in an executive committee than go through the process of holding a separate convention. Second, a state convention if formed as outlined above, would be under the control of the faction that selected the delegates. The seating of delegates of the same faction and recognition of its county executive committees would be a matter of course.

[45]It is the opinion of a former official of the state Democratic committee that such a development as is described here would never occur in practice.

[46]The writer knows of counties in the state where this is authoritatively said to have actually occurred.

[47]Sections 3, 4, 5, 6, and 7 regulate in an elaborate manner the conduct of primaries—registration, voting, counting of ballots, etc. See Miss. Laws Ex. Sess. 1935, pp. 34-39.

Mississippi has gone a long way in the regulation of party activities. The control of organization and powers, deterred to some extent by the traditional dread of the racial problem, has recently come to receive attention. One cannot look for any such elaborate regulation of powers as may be found in other states. The experiences of Texas[43] and the general background of the party question will prevent that. But increased state control over party government, as its necessity becomes more evident, may be confidently expected.

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[43]See Nixon v. Herndon, 273 U. S. 536, 71 L. ed. 759 (1926); Nixon v. Condon, 286 U. S. 75, 76 L. ed. 984 (1931).

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NOTES

Contract Relations of the Infant in Mississippi—Disaffirmance of Contracts and Liability for Necessaries*

The "distinctive disability" of an infant lies in his contracts.[1] In the early history of the common law they were classified into void, voidable, and binding contracts, as determined by whether they were prejudicial, possibly beneficial, or certainly beneficial to the infant as necessaries.[2] But the resulting technical distinctions and the difficulty in determining the class into which a given set of facts fitted necessitated the more practical rule which is generally applicable today, that the contracts of an infant are not void, but voidable. It is the purpose of this note to collate and analyze, as briefly as possible, the Mississippi cases considering infants' contracts within the above subject, and, it is hoped, to aid in the clarification of certain doctrines embodied therein.

I. Avoidance and Disaffirmance

The generally accepted meaning of "voidable" connotes a valid act which may be avoided. Adopting such a definition, most courts hold that both executed and executory contracts of infants are merely voidable.[3] Although accepting this doctrine as to executed contracts of infants, and holding that "executed contracts of infants must be disaffirmed or they will become obligatory," several Mississippi cases have held that "executory contracts must be affirmed or they will be null."[4] Differently stated, the executory contract of an infant in Mississippi is void until confirmed, whereas in the majority of the states it is considered as valid until disaffirmed. As pointed out by Mr. Williston, although a few states accept the doctrine prevailing in Mississippi regarding executory

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*A subsequent note, completing this treatment of infants' contracts in Miss., will discuss the Miss. law relating to ratification by, and estoppel of, infants.

[1]For well-considered, general treatments of the subject see Ewell, *The Void and Voidable Acts of Infants* (1878) 13 Am. L. Rev. 280; 1 Williston and Thompson, Contracts (2d ed. 1936) §§ 222-248; 1 Elliott, Contracts (1913 ed.) §§ 285-355; 3 Page, The Law of Contracts (2d ed., 1920) §§ 1570-1625; Miss. Code 1930, §§ 1373, 1376 (words "infant" and "minor", respectively, mean person under 21 years of age).

[2]1 Williston and Thompson, Contracts (2d ed., 1936) § 223; 1 Elliot, Contracts (1913 ed.) § 287.

[3]1 Elliott, Contracts (1913 ed.) § 302; 1 Williston and Thompson, Contracts (2d ed. 1936) § 226; 3 Page, The Law of Contracts (2d ed. 1920) § 1593; Restatement, Contracts (1932) § 431; Goble, *Infant's Contracts for the Sale of Chattels* (1926) 20 Ill. L. Rev. 343.

[4]Edmunds v. Mister, 58 Miss. 765, 775 (1881); but see Markham v. Merritt, 7 How. 437, 40 Am. Dec. 76 (Miss. 1843).

contracts of infants,[5] the distinction between the legal status of executed and executory contracts is "unfounded," and has been severely criticized.[6] Despite the fact that this distinction is unnecessary and has been abandoned by the majority of courts for many years, it should be borne in mind that it is in force in this state and theoretically is important.[7] Hence the general status in Mississippi of infants' contracts may be described in this manner: where the contract has been executed by both parties, it is obligatory upon the infant until he expressly or impliedly disaffirms same; where it is to be performed in the future, no legal liability whatever is imposed upon the infant, but the executory contract "may furnish a sufficient consideration to support" a new promise or ratification thereof.[8]

As a matter of practical application, however, this two-classification type of theory to which Mississippi adheres is mere judicial logomachy and a modification of the more ancient classification of infants' contracts as beneficial, harmful, or possibly beneficial and possibly harmful. The underbrush could be cleared out of one confused technicality and the commendable policy of protecting infants from any overreaching by others could be continued by simply holding that infants' contracts are merely voidable, excepting that small group for which he is at all events liable. Then the infant himself could, upon reaching maturity, determine what contracts are for his interest and what are not, and the latter could

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[5]See Minock v. Shortridge, 21 Mich. 304 (1870); Edgerly v. Shaw, 25 N. H. 514, 57 Am. Dec. 349 (1852); Tyler v. Gallop, 68 Mich. 185, 35 N. W. 902, 13 Am. St. Rep. 336 (1888); Beardsley v. Hotchkiss, 96 N. Y. 201 (1884).

[6]1 WILLISTON AND THOMPSON, CONTRACTS (2d ed. 1936) § 231, explaining what the courts following this doctrine probably mean: "An executed sale transfers title and a transfer of title is an important thing even though it may be avoided; on the other hand an executory contract is only important if it is ultimately performed or creates a liability for non-performance. Now inasmuch as the performance of the contract by the infant or his liability for non-performance are wholly dependent upon his own choice until and unless he ratifies the contract after coming of age, it seems accurate to say that there is until then no contract." See also, MISS. CODE 1930 § 3350, requiring a written ratification of a *quondam* infant's contract or promise; 3 PAGE, LAW OF CONTRACTS (2d ed. 1920) § 2746; 1 ELLIOT, CONTRACTS (1913 ed.) § 302.

[7]"If the note has no validity until confirmed, it is hard to explain how it can be negotiated, and similarly a covenant, if it has any validity as such, must derive it from the sealing and delivery when it was made, not from a subsequent . . . ratification . . . If an infant's executory promise amounts to nothing until ratified, it is impossible to see how it can be consideration for the counter-promise of an adult, but that it is so, was early and conclusively settled." 1 WILLISTON AND THOMPSON, CONTRACTS (2d ed. 1936) § 231.

[8]Edmunds v. Mister, 58 Miss. 765, 773 (1881).

thereupon be readily disaffirmed. The more recent Mississippi cases touching this point seem to be tending in this direction.[9]

Although mere privity of estate does not enable one to avoid an infant's contract or conveyance, either his heir or his legal representative may assert the minor's power, in the same manner and to the same extent as the infant could, if living.[10] No Mississippi cases have been found as to the rights thereunder of creditors, trustees, or assignees in bankruptcy, and assignees by purchase, but it would seem that this state would follow the general doctrine elsewhere, which holds that the above-mentioned parties cannot claim under an infant a power of avoidance.[11] Since an infant's contract of partnership is, like all his other contracts, voidable, he is not bound by the contracts of his partners within the scope of the partnership, since he could revoke the contracts if he had executed them himself.[12]

The general rule concerning the time of the exercise of the power of disaffirmance is that an infant's deed of realty can be avoided only after he has attained majority,[13] although a contract regarding personal property may be disaffirmed during minority.[14]

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[9]Several of the following quotations used are dicta, but are significant as to the trend. Bell v. Smith, 155 Miss. 227, 234, 124 So. 331 (1929): "A contract with an infant is voidable, not void"; Mellot v. Love, 152 Miss. 860, 865, 119 So. 913 (1929): "Except for necessaries and . . . , it has long been settled that the contracts of infants impose no liability upon them which is not voidable at their election"; Conn v. Boutwell, 101 Miss. 353, 58 So. 100 (1912); Yeager v. Knight, 60 Miss. 730, 732 (1883): "It is manifest . . . that no action will lie simply by reason of the refusal of an infant to carry out an executory contract, nor because of his disaffirmance after majority, of his executed contracts"; Brentley v. Wolf, 60 Miss. 420 (1882); Edmunds v. Mister, 58 Miss. 765, 775 (1881): "Executed contracts of infants must be disaffirmed or they will become obligatory; executory contracts must be affirmed or they will be null"; Allen v. Pool, 54 Miss. 323, 330 (1877): "Whatever doubts may have been once entertained, it is now well settled that the deed of an infant is not void, but only voidable"; Thompson v. Strickland, 52 Miss. 574 (1876); Hill v. Anderson, 13 Miss. 216, 224 (1845): "An executed contract by an infant, with reference to personal property, may be rescinded by the infant, as well as a contract executory."

[10]Harvey v. Briggs, 68 Miss. 60, 8 So. 274 (1890); Sou. Auto Co. v. Holifield, 145 Miss. 51, 111 So. 96 (1927). In Alsworth v. Cordtz, 31 Miss. 316 (1856), the court stated that "infancy is a personal privilege," and can only be set up by the party himself, and not by third persons. The holding as applied to facts of that case was correct, but, as pointed out in Harvey v. Briggs, *supra*, it is universally recognized that the heir or legal representative of the infant may plead the defense of infancy.

[11]1 ELLIOT, CONTRACTS (1913 ed.) § 335; 1 WILLISTON AND THOMPSON, CONTRACTS (2d ed. 1936) § 232; 3 PAGE, THE LAW OF CONTRACTS (2d ed. 1920) § 1609.

[12]Foot v. Goldman, 68 Miss. 529, 10 So. 62 (1891).

[13]Harrod v. Myers, 21 Ark. 592, 76 Am. Dec. 409 (1860); McCarthy v. Nicrosi, 72 Ala. 332, 47 Am. Rep. 418 (1882).

[14]Shipley v. Smith, 162 Ind. 526, 70 N. E. 803 (1904); McCarthy v. Henderson, 138 Mass. 310 (1885).

Of the latter doctrine it is said that "the transitory nature of personal property makes this rule essential to the infant's protection."[15] In Mississippi, however, not only may a contract concerning personalty be avoided during infancy,[16] but also it is held that "a minor is not bound by her act in executing a deed to land, ... and she can disaffirm the deed while under a disability of minority and recover her property."[17] The maximum time in which an infant's executed contract may be disaffirmed, in the absence of circumstances creating estoppel, is limited only by the statute of limitations as calculated from the date of the *quondam* infant's majority.[18] Although Mississippi is in line with a number of states and the federal courts, the British courts and many American state courts hold that the infant must rescind within a reasonable time after majority, what is a reasonable time being a question of fact depending upon the circumstances of each case.[19]

So far as the power of disaffirmance is concerned, there is no distinction between executed and executory contracts.[20] An infant may disaffirm any of his voidable contracts. *Conn v. Boutwell*[21]

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[15]1 WILLISTON AND THOMPSON, CONTRACTS (2d ed. 1936) § 235.

[16]Bell v. Smith, 155 Miss. 227, 124 So. 331 (1929); Gambrell v. Harper, 113 Miss. 715, 14 So. 623 (1917); Rhyne v. Miller, 133 Miss. 463, 97 So. 758 (1923); Hill v. Anderson, 13 Miss. 216 (1845); Mellot v. Love, 152 Miss. 860, 119 So. 913 (1929).

[17]Dufion v. Folkes, 153 Miss. 91, 120 So. 437 (1929); Thornton v. Holland, 87 Miss. 470, 40 So. 19 (1906); Cook v. Toumbs, 36 Miss. 685 (1859); see Ellis v. Alford, 64 Miss. 8, 1 So. 155 (1887); Cason v. Hubbard, 38 Miss. 35 (1859); Kilcrease v. Shelby, 23 Miss. 161 (1851) (where infant distributees in voluntary distribution disaffirmed); but see Cocks v. Simmons, 57 Miss. 183 (1879).

[18]Wallace v. Latham, 52 Miss. 291, 297 (1876): An "infant who makes a deed conveying realty during infancy has until such time as will complete the bar of the statute of limitations, after removal of the disability, to disaffirm his deed, and . . . bare recognition or silent acquiescence will not be regarded as confirmation of the sale"; Brantley v. Wolf, 60 Miss. 427 (1882); Allen v. Poole, 54 Miss. 330 (1877); see, also, Cox v. Mortgage Co., 88 Miss. 97; 40 So. 739 (1906); Hill v. Nash, 73 Miss. 862, 19 So. 707 (1897); Houston v. Building Ass'n., 80 Miss. 31, 31 So. 540, 92 Am. St. Rep. 565 (1902); Shipp v. McKee, 80 Miss. 741, 31 So. 197, 32 So. 281 (sug. of err. overr.) (1902); Watson v. Peebles, 102 Miss. 725, 59 So. 881 (1902); McLeiter v. Rackley, 148 Miss. 75, 114 So. 128 (1927) (adverse possessory period runs from maturity); but see Thompson v. Strickland, 52 Miss. 574, 578 (1876), and subsequent appeal of same case in 58 Miss. 186 (1880); for divers "savings" statutes for infants on running of statutes of limitations, see MISS. CODE 1930 §§ 2285, 2287, 2288, 2308, 2316, 2323, 468, 3264, 2296.

[19]See 3 PAGE, THE LAW OF CONTRACTS (2d ed. 1920) §§ 1611, 1612; Thompson v. Strickland, 52 Miss. 574 (1876); Hudson v. Strickland, 58 Miss. 186 (1880).

[20]Hill v. Anderson, 5 S. & M. 216 (Miss. 1845); but see MISS. CODE 1930 § 3808 (payment of bank deposit to infant valid); *id.* § 5177 (infant of 15 years or more may bindingly make and discharge life insurance contract).

[21]101 Miss. 353, 358, 87 So. 100 (1912); Brantley v. Wolf, 60 Miss. 420 (1882); Yeager v. Knight, 60 Miss. 730 (1882); Clark v. Rainey, 72 Miss. 151, 16 So. 499 (1894); Robb v. Halsey, 11 S. & M. 140, 146 (Miss. 1848): "The defense of infancy is equally available at law as in equity. A judgment

states the principle thus: "The right of an infant to void his contract is an absolute and paramount right, superior to all equities of other persons, and may be exercised against a *bona fide* purchaser from infant's grantee. . . The *bona fides* of the purchaser cannot supply the infant's want of capacity."[22] This doctrine also applies to personal property, and hence a *bona fide* purchaser, who is a subvendee of goods for value without notice of the original vendor's infancy, cannot hold the personal property against the infant disaffirming the contract.[23] An infant's voidable contract is therefore unlike contracts voidable for fraud or other equitable ground.[24]

Any act which clearly indicates the actor's intention to disaffirm his contract or conveyance is adequate.[25] That is, there must be an intention to disaffirm on the part of the infant, and this intention must be indicated and acted upon by some act inconsistent with the validity of the contract. Hence a second conveyance of land previously sold or conveyed by the infant is sufficient disaffirmance.[26] Equally so is a plea of infancy if the infant himself is sued on his contract.[27] In *fine*, no special method, manner, or form is required for an act of disaffirmance; adequate overt expression of intention is all that is required.

The maxim that "hard cases make bad law" is well exemplified in those cases involving the question of restoration by the infant of the consideration received. Attempting to balance their solicitude for the infant with fairness to the other party, the courts have of necessity confused the law thereon.[28] Mississippi has several well-reasoned cases on the principles applicable thereto. In *Lake*

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at law against an infant may be reversed by writ of error *coram nobis* and this seems to be the proper remedy." See Handy v. Cobb, 44 Miss. 699 (1870) (minor cannot bindingly agree to submission to arbitration); Parker v. Gillis, 108 Miss. 490, 66 So. 978 (1915); see also (1927) 16 GEO. L. J. 124; (1931) 17 VA. L. REV. 727.

[22]Brantley v. Wolf, 60 Miss. 420 (1882); Conn v. Boutwell, 101 Miss. 353, 58 So. 100 (1912) (Indicative of popularly confused terminology is this: "When an infant conveys lands, . . . in the eye of the law there is no conveyance,—not void it is true, but voidable."); Thompson v. Strickland, 52 Miss. 574 (1876).

[23]Hill v. Anderson, 13 Miss. 216 (1845); Upshaw v. Gibson, 53 Miss. 341 (1876); Mellot v. Love, 152 Miss. 860, 119 So. 913 (1929).

[24]See Hill v. Anderson, 13 Miss. 216, 224 (1845) ("That the rights of third persons had intervened makes no difference"); Cason v. Hubbard, 38 Miss. 35 (1859); see also UNIFORM SALES ACT § 24, for *contra* doctrine.

[25]1 WILLISTON AND THOMPSON, CONTRACTS (2d ed. 1936) § 234; see also Lawrence, *Right of Infant to Disaffirm Contract and Recover Consideration* (1921) 1 ORE. L. REV. 37.

[26]Allen v. Poole, 54 Miss. 323 (1877).

[27]Yeager v. Knight, 60 Miss. 730 (1883); but see Shands, *Consent Decrees Against Infants* (1928) 1 MISS. L. J. 434.

[28]1 ELLIOT, CONTRACTS (1913 ed.) § 346; see also (1927) 5 TEX. L. REV. 434.

v. Perry[29] it was held that a minor, who has squandered the consideration of a contract made by him while a minor, is not required as a condition of disaffirmance to return an amount equal to the consideration received or to place the other party *in statu quo*. To do so would be to deprive the infant of the protection which the law intends for him, namely, to protect him from the natural indiscretions of youth. When the infant no longer possesses the property, this rule is applicable to both executory promises[30] and executed transfers.[31] Mr. Williston points out[32] that two states have extended this rule so as to hold an infant liable on his contract, where he fails to restore what has been received, for the benefit he has actually derived from what he has received.[33] Of course, "if the minor has in possession any of the consideration received when he disaffirms his contract, or after he becomes of age, he must return it."[34] In other words, he must, as a condition of disaffirmance, "offer to surrender so much of the consideration as is still in his possession,[35] and which he has not lost or squandered during his infancy."[36] By the act of disaffirmance the infant loses the right to retain that which has been received, and, if he holds on

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[29]95 Miss. 550, 49 So. 509 (1909). In Hill v. Anderson, 13 Miss. 216, 224 (1845), Sharkey, C. J., stated, *obiter*, that "an infant may recover back his property real or personal, but in such cases he must refund what he has received," which dicta was apparently followed in Ferguson v. Bobo, 54 Miss. 121 (1876), but was repudiated in Brantley v. Wolf, 60 Miss. 420, 433 (1882), in which the court said: "If he [the infant] has lost or squandered the consideration during minority, this is nothing more than the law expects of him, and he cannot be required to purchase the right of reclaiming his own by still further abstractions from his estate. Such a rule would practically strike down the shield which the law, by reason of his inexperience and youth, throws around him." Accord: Harvey v. Briggs, 68 Miss. 60, 8 So. 274 (1890); Lake v. Perry, 95 Miss. 550, 49 So. 571 (1909).

[30]Brantley v. Wolf, 60 Miss. 420 (1882).

[31]Harvey v. Briggs, 68 Miss. 60, 8 So. 274 (1890); Lake v. Perry, 95 Miss. 550, 49 So. 569 (1909); Brantley v. Wolf, 60 Miss. 420 (1882).

[32]1 WILLISTON AND THOMPSON, CONTRACTS (2d ed. 1936) § 238.

[33]Beyland v. Multigraph Sales Co., 135 Minn. 67, 160 N. W. 191 (1916); Stack v. Cavanaugh, 67 N. H. 149, 153, 30 Atl. 350 (1892); Wooldridge v. Lavoie, 79 N. H. 21, 104 Atl. 346 (1918). It would seem that the same result could be accomplished by a slight extension of the doctrine of necessaries, for which discussion see *infra*.

[34]Brantley v. Wolf, 60 Miss. 420, 433 (1882); Harvey v. Briggs, 68 Miss. 60, 8 So. 274 (1890); see Commander v. Brazil, 88 Miss. 668, 672, 41 So. 497, 498 (1906); Dulion v. Folkes, 153 Miss. 91, 130, 120 So. 437, 442 (1929) (infant tendering back purchase money in suit to cancel deed); Lake v. Perry, 95 Miss. 550, 566, 49 So. 569, 572 (1909) (infant must offer to surrender consideration in his possession).

[35]Lake v. Perry, 95 Miss. 550, 49 So. 569 (1909); Brantley v. Wolf, 60 Miss. 420 (1882); Harvey v. Briggs, 68 Miss. 60, 8 So. 274 (1890).

[36]Bell v. Smith, 155 Miss. 227, 124 So. 331 (1929); Thornton v. Holland, 87 Miss. 470, 40 So. 19 (1906); see Quinn v. Moss. 12 S. & M. 365, 368 (Miss. 1849).

to the consideration or disposes of it after majority, it will amount to a ratification of his previously voidable contract.[37]

From the requisite return of property received which is in the infant's possession, it follows that there is a correlative limitation on his power to disaffirm, namely, that he cannot ratify a portion of an integrated transaction and disaffirm as to the rest. He cannot accept the good and reject the bad, without the consent of the adversary party. In disaffirming his obligation to pay, he necessarily disaffirms any title to the consideration received therefor.[38] Subsequent to a valid disaffirmance of an infant's contract, "the rights of the parties are as if the contract never existed,"[39] and hence "all parties are thereby restored to the status in which they would have been if the contract had never been made."[40]

II. Necessaries

That infants are liable for the reasonable value of necessaries purchased or otherwise secured is a commonly recognized exception to the general rule concerning their contracts.[41] Although Mississippi has had comparatively few cases concerned therewith, the aggregate indicates a certain trend which rightly deserves analysis.

Although the nature of an infant's liability for his necessaries is usually treated as arising from his promise, a more accurate terminology would treat it as a quasi-contractual obligation—that is, an infant may avoid his contract for necessaries just as he may his other obligations, but if he does so a liability which he cannot avoid will be imposed upon him by the law.[42] The law implies the promise to pay from the necessity of his situation.[43]

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[37]Brantley v. Wolf, 60 Miss. 420, 433 (1882); see Ostrander v. Quin, 84 Miss. 230, 235, 36 So. 257, 258 (1904) (in which question of failure to tender back and doctrine of estoppel were combined so as to deprive infant of remedy in equity); *cf.* Ferguson v. Bobo, 54 Miss. 122 (1876); Levy v. Gray, 56 Miss. 318 (1879); Yeager v. Knight, 60 Miss. 732 (1883); Wilie v. Brooks, 45 Miss. 542 (1871); Upshaw v. Gibson, 53 Miss. 341 (1876).

[38]Evans v. Morgan, 69 Miss. 328, 12 So. 270 (1891); see also Lake v. Perry, 95 Miss. 550, 49 So. 569 (1909); Brantley v. Wolf, 60 Miss. 420 (1882); Harvey v. Briggs, 68 Miss. 60, 8 So. 274 (1890).

[39]Evans v. Morgan, 69 Miss. 238, 12 So. 270 (1891); see Lake v. Perry, 95 Miss. 550, 566, 49 So. 569, 572 (1909).

[40]Mellot v. Love, 152 Miss. 860, 119 So. 913 (1929); French v. McAl[illegible] 61 Miss. 187 (1883); see also Cavers, *Effect of Disaffirmance By an Infa[illegible] of His Indorsement of Negotiable Paper* (1931) 37 W. Va. L. Q. 426.

[41]For able, general treatments of the subject see 1 Williston and Thompson, Contracts (2d ed. 1936) §§ 240-244; Miles, *The Infant's Liability For Necessaries* (1927) 43 Law Q. Rev. 389; 1 Elliot, Contracts (1913 ed.) § 295-301; 3 Page, The Law of Contracts (2d ed. 1920) §§ 1586-1592.

[42]1 Williston and Thompson, Contracts (2d ed. 1936) § 240; Woodward, The Law of Quasi-Contracts (1913 ed.) § 202 (unjust enrichment).

[43]Epperson v. Nugent, 57 Miss. 45, 47 (1879): "The liability of an infant for necessaries is based upon the necessity of his situation. As he must live,

In *Epperson v. Nugent* it was said: "What are necessaries cannot be determined by an arbitrary and inflexible rule. It depends on circumstances, and each case must be governed by its own."[44] A given article may be necessary to one person under certain circumstances and unnecessary to another person under different circumstances. As a general rule, however, it may be stated that the necessaries for which an infant may bind himself are personal and that the class appears to be closely limited under the heads of food, clothing of a reasonable kind, and shelter.[45] In *Williams v. Pool* the Mississippi Supreme Court, strictly applying this principle, held that an infant engaged in planting on his own account is not bound for supplies furnished him necessary to the occupation, and that "infants are not considered competent to carry on business of any sort."[46] In *fine*, articles essential for the conduct of an infant's business are not necessaries. Conceding that this rule is generally true, it would seem that, since the purpose of the doctrine of necessaries is solely to protect the infant, one who is sufficiently matured to conduct a business providing him a livelihood should be allowed to make binding contracts necessary to maintain it in operation. To hold otherwise is to concede the infant a right to necessaries without permitting him an honorable method of securing the same, since of course a merchant or wholesaler would not advance supplies or stock to a minor engaged in business unless the contract therefor be binding. However, until *Williams v. Pool* is overruled, the seller in such case advances supplies at his peril. A sound public policy should and could necessitate the suggested change under common law principles.

By Miss. Code Ann. 1930, § 1892 it is provided:

> "The powers and duties of every guardian of a minor over the person and estate of his ward shall cease and

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the law allows to anyone supplying his wants a reasonable compensation"; Decell v. Lewenthal, 57 Miss. 331 (1879); see Garrett v. Colvin, 77 Miss. 408, 26 So. 963 (1899); Frelick v. Turner, 26 Miss. 394 (1853).

[44]57 Miss. 45, 47 (1879). Following the ENGLISH SALE OF GOODS ACT, the UNIFORM SALES ACT, § 2, provides: "Necessaries in this section means goods suitable for the condition in life of such infant or other person, and to his actual requirements at the time of delivery."

[45]Decell v. Lewenthal, 57 Miss. 331 (1879); Chapman v. Hughes, 61 Miss. 339 (1883); Epperson v. Nugent, 57 Miss. 47 (1879); Brent v. Williams, 79 Miss. 355, 30 So. 713 (1901); 1 WILLISTON AND THOMPSON, CONTRACTS (2d ed. 1936) § 241; *cf.* Lord Coke's historical definition of necessaries, Co. Litt. 172a: "An infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessaries, and likewise for his good teaching or instruction whereby he may profit himself afterwards."

[46]Williams v. Poole, 144 Miss. 459, 110 So. 224 (1926); Greene v. Greene, 145 Miss. 87, 110 So. 218 (1926): A father, being charged by law with the support of his infant children, is personally bound for their necessaries, and consequently he cannot charge the child up with necessaries which it is his duty to furnish.

> determine when the ward shall arrive at the age of twenty-one years, or being over the age of eighteen years is married; and in either event the guardian shall forthwith deliver to the ward all the property of every description of the ward's, in his hands, and on failure, shall be liable to an action on his bond."

Under this semi-emancipation statute, which has been in effect since 1821, it was held that "the necessaries for a single infant are those which pertain to him individually, those of a married infant are such as pertain to himself and family, and those of a married infant to whom the law has intrusted his estate are such as pertain to himself, his family and his estate."[47] This question presents itself: If "necessaries" pertain to "his estate" under the statute, what if the estate includes a going business? Principle and reason suggest that the latter should be included in the former. Nevertheless, a married infant over eighteen years of age is not enabled by this statute to contract generally as an adult, even though the scope of his necessaries is enlarged.[48]

Whether or not a given set of articles are necessaries is a mixed question for the court and the jury. *Decell v. Lewenthal*[49] states the rule well: "The court determines whether the articles furnished fall within the class of necessaries suitable to anyone, infant or adult, in the defendant's situation and condition in life; and, if the court decides they do come within the class, the jury are to decide whether the particular articles furnished were actually

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[47]Chapman v. Hughes, 61 Miss. 339, 347 (1883): "His capacity to contract was by necessary implication extended to the necessities of his condition. He was not emancipated from all the disabilities of infancy, nor did he become able to contract generally, as an adult might, but the scope of his necessities was enlarged and, though his capacity to contract was still limited to the purchase of things necessary, what was included within these limits was increased as his condition changed."

[48]Chapman v. Hughes, 61 Miss. 339, 347 (1883); MADDEN, DOMESTIC RELATIONS (1931 ed.) 408: "Where the courts have made broad *obiter* statements to the effect that emancipation severs the father-child relation for all purposes, they have apparently forgotten the infant's general incapacity to bind himself by contracts, and to make irrevocable gifts and conveyances"; 1 WILLISTON, CONTRACTS (2d ed. 1936) § 225: "Emancipation does not give an infant enlarged capacity to contract, even when brought about by marriage"; but see Dick v. Grissom, Freem. Ch. 428 (Miss. 1844).

[49]57 Miss. 331, 336 (1879); Williams v. Poole, 144 Miss. 459, 110 So. 224 (1926); 1 WILLISTON AND THOMPSON, CONTRACTS (2d ed. 1936) § 241; Foster-McLaurin Furn. Co. v. Duval, 141 Miss. 556, 106 So. 825 (1926): Court may peremptorily instruct in favor of infant where there is "no evidence that would support a finding by the jury that the articles sold were actually necessary under the circumstances"; see also Mauldin v. So. Shorthand Univ., 126 Ga. 681, 55 S. E. 922 (1906); Cobbey v. Buchanan, 48 Neb. 391, 67 N. W. 176 (1896); Jacobs v. United Rys., 46 R. I. 230, 125 Atl. 286 (1922); Grace v. Hale, 2 Humph. 27, 36 Am. Dec. 296 (Tenn. 1841); Englebert v. Troxwell, 40 Neb. 195, 58 N. W. 852 (1894); 1 WILLISTON AND THOMPSON, CONTRACTS (2d ed. 1936) § 241; 1 ELLIOT, CONTRACTS (1913 ed.) § 296.

necessary under the circumstances of the case." In other words, whether the agreement includes goods which can under any circumstances be regarded as necessaries is a question of law; if the affirmative thereupon be decided by the court, then this question of fact is presented for the jury: whether the goods were necessaries in the particular case.

It was held in *Brent v. Williams*[50] that, in a suit by a tradesman or other vendor, the plaintiff's case requires: (1) that the articles sold shall be averred and proved to be necessaries; (2) that it must be charged and established that they were actually needed by the infant at the time of the sale; and (3) that it must be shown that proper necessaries were not furnished by the infant's parent or guardian, or anybody else, and that such parent, guardian, or other person did not supply the infant with money to buy necessaries. Conversely, the law will presume in the absence of proof that goods sold an infant are not necessaries.[51] And where a minor's necessaries are supplied by another, no recovery may be had against him.[52]

An interesting series of cases consider whether an attorney's services may be classed as necessaries. It is the prevailing rule today that services of an attorney cannot be contracted for by an infant in protection of his ordinary rights of property, since a guardian should control such matters,[53] but when an infant has no guardian, but has rights involved in litigation, and a lawyer has espoused the cause of the infant and devoted his services to the protection of the interests of the infant, one Mississippi case has held that "it is just and proper, and within the principle upon which the infant is held liable for necessaries, that the reasonable fees of such counsel should be paid out of the estate thus ob-

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[50]79 Miss. 355, 30 So. 713 (1901) (where it was shown that the infant was furnished sufficient money to have purchased adequate necessaries); Ferguson v. Bobo, 54 Miss. 121, 127 (1876); Williams v. Poole, 144 Miss. 459, 462, 110 So. 224 (1926); Decell v. Lewenthal, 57 Miss. 331, 34 Am. Rep. 449 (1879); Edmunds v. Mister, 58 Miss. 765 (1881); Epperson v. Nugent, 57 Miss. 47 (1879); Chapman v. Hughes, 61 Miss. 339 (1883).

[51]Edmunds v. Mister, 58 Miss. 765 (1881); Williams v. Poole, 144 Miss. 459, 110 So. 224 (1926); *cf.* Kyle v. Calmes, 1 How. 121 (Miss. 1834); Merell v. Melchior, 30 Miss. 516 (1855); Kerr v. Freeman, 33 Miss. 292 (1857).

[52]Brent v. Williams, 79 Miss. 355, 30 So. 713 (1901).

[53]McIsaac v. Adams, 190 Mass. 117, 76 N. E. 654 (1906); Baker v. Hibbard, 54 N. H. 539, 20 Am. Rep. 160 (1874); 1 WILLISTON AND THOMPSON, CONTRACTS (2d ed. 1936) § 242. But it is the general rule that charges for legal services furnished for an infant's personal relief or protection are recoverable. Barker v. Hibbard, 54 N. H. 539, 20 Am. Rep. 160 (1874) (defending against charges of crime); Munson v. Washband, 31 Conn. 303, 83 Am. Dec. 151 (1863) (bringing action for tort to person).

tained."[54] *A fortiori,* medical services are necessaries to an infant, who may himself call in a surgeon and bind his estate for a reasonable fee.[55]

Lord Coke stated that an infant binds himself to pay "for his teaching and instruction,"[56] and it is true that an elementary education is considered a necessary, for which a father is liable; but he is under no duty to give his son a collegiate or professional education.[57] This case, however, does not preclude any subsequent agreement with the general rule which makes the question depend upon the infant's circumstances and station in life.[58]

It frequently happens that an infant is unable to get credit for necessaries, but can borrow money from a friend with which to buy them. Certain English cases held that in such a situation the money borrowed is not a binding debt for necessaries, since the lender put it in the infant's power to misapply the funds, but the general rule now is that the infant is liable in equity for the money actually expended for necessaries.[59] Although Mississippi has no case precisely on the point, *Ostrander v. Quin*[60] is interestingly close. In that case an infant borrowed money on the faith of his representation that he was an adult, and used it to purchase necessaries. It was held that he could not in chancery defeat a mortgage which he had given to secure the loan. The facts presented a splendid opportunity to settle the point under discussion, but unfortunately, the principle opinion of the court based its holding on the ground of estoppel. However, Mr. Chief Justice Whitfield concurred specially on the specific principle that the money borrowed was actually used for necessaries.

Is the Mississippi law on the disaffirmance of infant's contracts and on necessaries satisfactory? Of recent years the reported

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[54]Epperson v. Nugent, 57 Miss. 45, 47 (1879). In Pugh v. Dorsey, 8 S. & M. 379 (Miss. 1847) the jurisdiction of the chancery court to decree compensation to a lawyer, who had rendered his services to minors, was denied on the ground that his remedy, if any, was at law. Epperson v. Nugent, *supra,* points out, however, that when Pugh v. Dorsey was decided the probate court had exclusive jurisdiction of minor's business, the chancery court, none.

[55]Williams v. Bonner, 79 Miss. 664, 31 So. 207 (1902). Hence when a ward is seriously injured, the guardian has authority without order of the court, to contract for the payment of the physician's charges from the corpus of the ward's estate. See also Frelick v. Turner, 26 Miss. 394 (1853).

[56]Co. Litt. 172a.

[57]Garrett v. Colvin, 77 Miss. 408, 26 So. 963 (1899).

[58]Mauldin v. Sou. Shorthand Univ., 126 Ga. 681, 55 S. E. 922 (1906); Curtiss v. Roosevelt Aviation School, 5 AIR L. REV. 382 (N. Y. City Mun. Ct.) (1934); Esteb v. Esteb, 138 Wash. 174, 244 Pac. 264 (1926); 1 WILLISTON AND THOMPSON, CONTRACTS (2d ed. 1936) § 241.

[59]1 WILLISTON AND THOMPSON, CONTRACTS (2d ed. 1936) § 243; 1 ELLIOT, CONTRACTS (1913 ed.) § 301.

[60]84 Miss. 230, 36 So. 257 (1904).

cases dealing with these questions have been surprisingly few. But, since *Edmunds v. Mister* in 1881, it is apparent that the theoretical distinction of the effect of operation between executed and executory contracts has been practically obliterated. The almost completely unrestricted right of the infant to disaffirm should be modified in several respects, as, for example, in certain instances of *bona fide* purchasers without notice, and of restoration of consideration received. Conversely, it is the writer's opinion that the Mississippi courts have not extended the doctrine of necessaries as far as it should be. Consider the case of the infant able to make a living by conducting a business but unable to secure credit therefor, and the vast change between the standard of living of today and of 1700, by which latter standards necessaries are at present adjudged. Although solicitude for the infant's rights is commendable, a practically unrestricted power of disaffirmance is not the answer to the problem of the infant in society.

William N. Ethridge, Jr.

Emotional Disturbance and Resulting Physical Injuries—A New Theory for Recovery

The soundness of a legal policy to allow direct recovery for mental distress and physical injury resulting therefrom has long been a problem confronting our courts. In a recent case[1] the Supreme Court of Mississippi announced an interesting doctrine. Plaintiff had a health insurance policy with the defendant company. He fell ill and made application for payment under this policy. The defendant sent its investigator to visit the plaintiff. The investigator found plaintiff sitting on his front porch, and, while discussing his claim with him, used language which strongly insinuated that plaintiff was a thief and was trying to defraud the company.[2] Investigator left plaintiff's premises after these utterances. Plaintiff elected to sue defendant in an action for personal injuries. Evidence tended to show that plaintiff suffered aggravation of physical illness as a result of the investigator's words. The court in its holding admitted the common law doctrine that mere words, however offensive or insulting, are not actionable, when the conduct of the party does not amount to an assault. Al-

[1]Continental Casualty Co. v. Garrett, 173 Miss. 676, 161 So. 753 (1935).

[2]The words used were: "You are a liar. If I paid that claim I would be sent down the road. A few days ago I caught a woman in bed with her shoes on stealing from the company playing sick and I am getting tired of people stealing from the company like that." *Id.*, at 679, 161 So. at 754.

though hinting that this doctrine has been disproved today,[3] the court allowed recovery irrespective of its application on the ground that the language used by the defendant's authorized agent was a sufficient invasion of the peace and quietude of the home to be an actionable tort *per se*. In support of this holding, which gives particular recognition to actions arising out of the violations of the rights of the home, the court, after stating that the doctrine was particularly true in Mississippi,[4] refers to several authorities.[5] Upon close examination none of the cases cited appear to be authority for this proposition of law, as in each the intruder was actually a trespasser at the time of the offense.[6]

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[3]The court points out that if the ancient jurists refused recovery because of a fear of fraudulent claims, the actionable word statute in Mississippi has disproved such fears. This statute allows recovery for spoken insults which are apt to cause a breach of the peace.

[4]The words used by Justice Griffith were: "All our modern notions of law, common and statutory, and particularly in this state comprise the requirement that the home is a place where the occupant and his family shall be entitled, not as a matter of sentiment, or of good morals, or of good manners, but of positive law, to the right of quiet and peaceable enjoyment, free from hostile intrusions, whatever the character of the offensive intrusions may be." *Id.*, at 681, 161 So. at 755.

[5]The court refers to the following cases in this manner: "See for instance, Engle v. Simmons, 148 Ala. 92, 41 So. 1023, 7 L. R. A. (N. S.) 96, 121 Am. St. Rep. 59, 12 Ann. Cas. 740 (1906); Watson v. Dilts, 116 Iowa 249, 89 N. W. 1068, 57 L. R. A. 559, 561, 93 Am. St. Rep. 239 (1902); Hill v. Kimball, 76 Tex. 210, 13 S. W. 59, 7 L. R. A. 618 (1890); and compare Singer Sewing Machine Co. v. Stockton [171 Miss. 209] 157 So. 366 (1934)." The form of the reference, which is not a direct citation, is perhaps significant.

[6]In Engle v. Simmons, 148 Ala. 92, 41 So. 1023 (1906), the defendant entered the dwelling house of the plaintiff, who was far advanced in pregnancy, in the absence of her husband, with the evident purpose of collecting a claim against the husband. He was informed by the plaintiff of her husband's absence, and was requested to leave the premises; but without legal cause or good excuse he persisted in interrogating the plaintiff and in taking an inventory of her household effects, and made threats of what he intended to do. This caused the plaintiff to be thrown into a state of nervous excitement. While the court points out that the suit is for the injury to the plaintiff and not for a trespass to the realty it does not say that it is allowing recovery irrespective of this trespass. By his refusal to depart when requested the defendant certainly became a trespasser to the realty, and to the damages for this wrong, the court was enabled to tack on additional compensation for emotional disturbances. No mention is made of the doctrine announced by the Mississippi court. Evidence that the Alabama court was not intending to establish precedent and allow direct recovery is found in later decisions. In Maze v. Employees Loan Society, 217 Ala. 44, 114 So. 574 (1927), the court said: "The use by defendants of mere words to plaintiff, which had not the effect to injure him physically and were not accompanied with an actual offer of physical violence, or did not interfere with his contractual relations and property rights, are not actionable as a trespass to the person, or libel or slander." *Cf.* also Republic Iron & Steel Co. v. Self, 192 Ala. 403, 68 So. 328 (1915).

The second case the court refers to is Watson v. Dilts, 116 Iowa 249, 89 N. W. 1068 (1890). The defendant stealthily and wrongfully entered the plaintiff's home at night without permission, and engaged in a struggle with the plaintiff's husband, causing her to suffer fright and physical disability.

When the conduct did not amount to an assault the common law refused relief for mere words which gave rise to emotional disturbance, even though the consequences might be manifested in physical injury.[7] The earliest actions *ex delicto* recognized by the common law were actionable only through the writ of trespass *vi et armis*. An application of force to the person or possession of the plaintiff was an absolute prerequisite.[8] Unless these elements were present the law courts refused recovery no matter how morally offensive the defendant's conduct may have been or how severe the damage incurred thereby. This situation was remedied somewhat by the Statute of Westminster II,[9] and as a result the actions of libel and slander found their way into the law. But the plaintiff was still remediless where the defendant's conduct did not violate a legally protected interest. This system was obviously incapable of handling meritorious cases where the plaintiff could not come within the above theory of the law.

The next step forward came when the courts began to allow recovery for injuries to emotions as parasitic damages to an action otherwise cognizable by the court according to more orthodox standards.[10] Thus where an injury to the person or property of plaintiff was shown, the courts would allow additional compensation for any emotional disturbances inflicted by the same act, but not otherwise. Some few courts began to draw a distinction and

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Defendant was obviously a trespasser from the moment he entered the house and was therefore liable for any physical injuries resulting from his wrongful conduct.

The next case cited is Hill v. Kimball, 76 Tex. 210, 13 S. W. 59 (1902). The plaintiffs, husband and wife, were in possession under a lease of a dwelling house of defendant. In spite of his knowledge that the wife was well advanced in pregnancy he entered upon the property, and in the immediate presence of the wife, he assaulted two negroes, using profane language, thus causing plaintiff to become frightened and suffer a miscarriage. The defedant in this case became a trespasser in committing the assault. See Hallen, *Hill v. Kimball—A Milestone in the Law* (1933) 12 TEX. L. REV. 1.

The last case to which the court referred is Singer Sewing Machine Co. v. Stockton, 171 Miss. 209, 157 So. 366 (1934). In that case the defendant's agent caught hold of the plaintiff's hands, thus making a physical assault upon her.

[7]Mitchell v. Rochester Ry., 151 N. Y. 107, 45 N. E. 354 (1896); Kramer v. Ricksmeir, 159 Iowa 481, 139 N. W. 1091 (1913); Nelson v. Crawford, 122 Mich. 466, 81 N. W. 335 (1899); Brooker v. Silverthorne, 111 S. C. 553, 99 S. E. 350 (1919); Louisville v. Bartee, 204 Ala. 593, 86 So. 394 (1920); Throckmorton, *Damages for Fright* (1921) 34 HARV. L. REV. 260.

[8]SHIPMAN, COMMON LAW PLEADING (3d ed. 1923) 335.

[9]This statute provided that where a situation was presented *in consimili casu* to an established form of action that a new writ on the case would be devised.

[10]Watson v. Dilts, 116 Iowa 249, 89 N. W. 1068 (1902); May v. Western Union Tel. Co., 157 N. C. 416, 72 S. E. 1059 (1911); Singer Sewing Machine Co. v. Stockton, 171 Miss. 209, 157 So. 366 (1934). *Cf.* Pound, *Interests of Personalty* (1915) 28 HARV. L. REV. 342, 359.

to indicate that recovery might be allowed where the words uttered, or acts done, should have reasonably been foreseen to cause physical injury as a result of mental upheaval.[11]

The instant case could possibly be justified upon this basis, but it is very doubtful whether the insurance investigator could have reasonably foreseen any serious emotional disturbance; and certainly there was no reason to anticipate a resultant physical injury. It is hard to conceive a trespass to realty in this case if we accept the doctrine that mere words are not an independent wrong. If the words alone are not a legal wrong, how can they *ipso facto* render the investigator a trespasser?

In cases where the injury results from fright caused by the defendant's general negligent conduct the courts, in an effort to circumvent the rule denying recovery, have proved very much inclined to create and resort to specific exceptions.[12] Thus some courts allow recovery where the defendant's conduct amounts to a nuisance.[13] Others allow recovery for injuries resulting from fright or shock when the claims were brought under the Workmen's Compensation Acts.[14] Where plaintiff is frightened by the defendant's conduct and sustains injuries in a reasonable effort to escape the impending danger, recovery is allowed even though,

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[11]Wilkinson v. Downton, 2 Q. B. 57 (1897). Defendant, as a practical joker, falsely told plaintiff that her husband had been severely injured in an accident. The statement was made with the intent to be believed as true. Plaintiff suffered a violent nervous shock which rendered her ill. The court said: "The defendant has wilfully done an act calculated to cause physical harm to the plaintiff. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act." The court admits the present case is without precedent. Price v. Yellow Pine Paper Mill Co., 240 S. W. 588 (Tex. Civ. App. 1922) where plaintiff recovered damages for a miscarriage resulting from fright and shock caused when the defendant's general manager without warning, brought home her injured husband in a bruised and bloody condition after an accident at the mill. The injured employee, in a moment of consciousness, had warned the manager not to bring him home in view of his wife's health. *Cf.* Nickerson v. Hodges, 146 La. 735, 84 So. 37 (1920), in which defendants, knowing that plaintiff believed in family tradition, placed a fake pot of gold so plaintiff could find it. Judgment for plaintiff for mental distress. See Note (1921) 34 HAR. L. REV. 337 But *cf.* Oehler v. Bamberger & Co., 4 N. J. Misc. 1003, 135 Atl. 71 (Sup. Ct. 1926). See generally Parry, *Nervous Shock as a Cause of Action in Tort* (1925) 41 L. Q. REV. 297; Magruder, *Mental and Emotional Disturbance in the Law of Torts* (1936) 49 HAR. L. REV. 1033.

[12]Where defendant's acts were wilful, recovery has been allowed without question. Preiser v. Weilandt, 48 App. Div. 569, 62 N. Y. Supp. 890 (2d. Dept. 1900); see Pound, *supra* Note 10, at 361.

[13]Shellabarger v. Morris, 115 Mo. App. 566, 91 S. W. 1005 (1905); Carrol v. N. Y. Pie Baking Co., 215 App. Div. 240, 213 N. Y. Supp. 553 (2d. Dept. 1926).

[14]Hall v. Doremus, 114 N. J. L. 147, 175 Atl. 369 (Sup. Ct. 1934).

had the plaintiff done nothing, he would have escaped unscathed.[15] Again, courts allow recovery where the injury to the plaintiff is accompanied by the breach of some contractual obligation.[16] But the instant case does not clearly fall within any of these exceptions.[17]

As to the express theory upon which the court based its decision—the theory that there may be recovery for insulting words if they are spoken to a man *in his home*—the court is without direct authority. If it wishes to establish a new rule to this effect, however, there are certain bases in the law upon which it may rely to some extent. Courts do make an exception of the home in criminal cases. In no jurisdiction does a person have to retreat from an attacker, even though he might escape, when the attack is made upon him in his home.[18] Mississippi goes still further, and says that a man need never retreat, no matter where he is when attacked.[19] This shows a tendency of the courts of Mississippi to protect the pride and dignity of its citizens even where human life is endangered—a tendency which may subconsciously have affected the decision in the instant case. This tendency to make exceptions of the home is again clearly shown by a statute[20] which makes one criminally liable for indecent exposure of one's person upon entering the dwelling house, yard, etc., of another.[21]

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[15]Illinois Central R. R. Co. v. Haecker, 110 Ill. App. 102 (1903); Cameron v. New England Tel. Co., 182 Mass. 310, 65 N. E. 385 (1902); Thomas v. So. Pa. Traction Co., 270 Pa. 146, 112 Atl. 918 (1921).

[16]Bleecker v. Colorado & Southern Ry., 50 Colo. 140, 114 Pac. 481 (1911); see Gulf C. & S. F. Ry. v. Luther, 40 Tex. Civ. App. 517, 523, 90 S. W. 44, 48 (1905) in which the court said: "the liability of a common carrier for insults by its servants causing humiliation, a sense of disgrace, mental anguish or fear in a passenger, is independent of physical injury or bodily harm." Recovery was allowed in Dunn v. Western Union Tel. Co., 2 Ga. App. 845, 59 S. E. 189 (1907) where telegraph operator insulted plaintiff while there on business. Devis v. Tacoma Ry. & Power Co., 35 Wash. 203, 77 Pac. 209 (1904) held that a proprietor of a public amusement park was liable for insults to patrons by an employee. See Green, *"Fright" Cases* (1933) 27 ILL. L. REV. 761, 763-80.

[17]Perhaps it might be suggested that the insurance investigator's insults were a sufficient breach of contract to come within the rule of the cases last cited, but this seems doubtful.

[18]Lee v. State, 92 Ala. 15, 9 So. 407 (1891); Brinkly v. State, 89 Ala. 34, 8 So. 22 (1890); Palmer v. State, 9 Wyo. 40, 59 Pac. 793 (1900).

[19]In McCall v. State, 29 So. 1003 (Miss. 1901) the court said: "Flight is one of the means of avoiding danger which was necessary to be made at common law, but is not required in this state." For other cases on the point see Long v. State, 52 Miss. 23 (1876); Bang v. State, 60 Miss. 571 (1882); People v. Heckler, 109 Cal. 451, 42 Pac. 307 (1895); State v. Robertson, 50 La. Ann. 92, 23 So. 9 (1898); State v. Bartlett, 170 Mo. 658, 71 S. W. 148 (1902).

[20]MISS. CODE ANN. 1930 § 863.

[21]On the effect of statutes as showing the attitude of a state toward a problem and aiding the courts in reaching a decision upon some aspect of the problem not expressly covered by statute, see Landis, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS (1934) 213.

Another factor which might easily have influenced the court in the decision in the instant case is the fact that the actionable word statute,[22] which allows recovery for spoken insults, would have caused the plaintiff to recover in this case except for the fact that the defendant was a corporation.[23] The court may have felt that this limitation upon the operation of the statute was proper at the time of its enactment and for the purpose for which the statute was originally adopted, but that it is inappropriate at the present time; and it may therefore have adopted this method of restricting the application of the limitation.

The court points out that fears that a multitude of fraudulent claims might result if direct recovery were allowed for emotional disturbances, have been disproved by the experience of the state with the actionable word statute.[24] Although this statement was unnecessary for the decision, the language used might reasonably be construed to indicate that the court would allow recovery where the plaintiff could prove only emotional upheaval from mere words, unaccompanied by a trespass to the realty or person of plaintiff.

Would the court be going too far if it openly and directly allowed recovery for physical injuries resulting from emotional disturbances when such can be reasonably determined? It is believed that where words are uttered which in their nature are conducive to a violent emotional disturbance in the person to whom they are spoken, and where such words actually produce physical injuries

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[22]MISS. CODE ANN. 1930, § 11; see *supra* note 3. West Virginia and Virginia have substantially identical statutes. W. VA. CODE ANN. (MICHIE, 1932) § 5471; VA. CODE (MICHIE, 1930) § 5781.

[23]The reason for this is that the statute was passed for the purpose of preventing duels, caused by insulting language. The language had to be of such a nature as likely to cause a breach of the peace. A corporation obviously could not fight a duel. Neely v. Payne, 126 Miss. 854, 89 So. 669 (1921); Dixie Fire Insurance Co. v. Betty, 101 Miss. 880, 58 So. 705 (1912).

[24]For expression of such fears see Spade v. Lynn & Boston R. R., 168 Mass. 285, 47 N. E. 88 (1897); Comstock v. Wilson, 257 N. Y. 231, 177 N. E. 431 (1931); Mitchel v. Rochester Railway Co., 151 N. Y. 107, 45 N. E. 354. *Cf.* Pound, *The Limits of Effective Legal Action* (1917) 3 A. B. A. J. 55, 65-66; but *cf.* Chiuchiolo v. New England Wholesale Tailors, 84 N. H. 329, 335, 150 Atl. 540, 543 (1930); Dulieu v. White & Sons, 2 K. B. 669, 681 (1901).

Other reasons suggested against allowing recovery include: (1) Since no recovery can be had for mere fright, there can be none for its consequences; (2) injuries sustained through fright caused by another's negligence cannot be considered the proximate result of such conduct. These reasons are suggested in Mitchel v. Rochester Ry. Co., *supra*. For effective answers see Bohlen, *Right to Recover for Injury Resulting from Negligence Without Impact*, in STUDIES IN THE LAW OF TORTS (1926) 252, 265-69. For a comprehensive discussion of reasons against recovery and an evolution of their weight see N. Y. Law Revision Comm., Second Ann. Report (Legis. Doc. No. 65, 1936) 377, at 410-22.

as a result of the emotional upheaval, he cannot complain that the physical consequences which ensue were not reasonably foreseeable by him.[25] Although there may be merit to cases where worry, grief, and mental upheaval result without physical injury, the inability of the jury to measure accurately the damages in dollars and cents, and the possibility of a multitude of fraudulent claims, lead to a limitation of recovery to cases where physical injury occurs and such physical injury is capable of fairly scientific ascertainment.

Although the instant case does not entirely reach the above desired goal, it is a definite step toward that direction in that it invents another channel to add to the numerous others by which recovery may be allowed in certain scientific types of situations.

Eventually these exceptions will have become so numerous and so broad that the rule denying recovery will have become completely undermined.[26]

Frederick C. Berger

The Admissibility of Blood Tests in Evidence

The present year has witnessed the first acceptance by a court of last resort, in the United States, of definite and specific genetic laws as applicable to the adjudication of human affairs. This notable step was taken by the Supreme Court of South Dakota in the case of *State v. Damm* (April 16, 1936).[1] The defendant herein, who was being prosecuted upon a charge of second-degree rape, requested the trial court to order the making of certain tests upon his own blood, that of the prosecutrix, and that of the latter's illegitimate child, upon the grounds that by such tests it might be

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[25]RESTATEMENT, TORTS (1934) § 312 limits recovery to cases where the defendant should foresee that his conduct is likely to result in illness or other bodily harm. Its view makes the chance of recovery very small, because unless defendant knew plaintiff was in some extraordinary condition, it is very unlikely that mere language, no matter how vituperative, would result in physical injury. In the rule suggested above the plaintiff would have a much better chance of recovery, and the requirement of actual physical injury would reduce the possibility of fraudulent and fictitious claims pratically to nil.

Cf. the statute proposed by the Law Revision Commission of New York which says: "In an action to recover damages for bodily injury or wrongful death hereafter caused, recovery shall not be denied merely because such bodily injury or wrongful death was brought about through fright or shock without physical contact or impact." N. Y. Law Revision Commission, *op. cit.* note 24, at 377. It will be noted that this statute makes no requirement at all of foreseeability.

[26]For a collection of articles and other authorities on the general subject see N. Y. Law Revision Comm. *op. cit.* Note 24, at 448, n. 259.

[1]State v. Damm, ... S. D. ....., 266 N. W. 667 (1936).

possible scientifically to determine that the defendant could not have been said infant's father. The materiality of such evidence to the defense, in case it had been actually obtained and admitted, is obvious. Defendant, having been convicted, appealed to the state supreme court, alleging, among other grounds of error, the denial by the trial court of his request for the making of these tests. His appeal was first heard December 29, 1933,[2] at which time the court ruled "that it does not sufficiently appear from the record in this case" that the tests were universally conceded valid by scientific and medical authorities, and hence that the trial court did not err in denying defendant's request. This opinion was widely interpreted as a direct holding upon the reliability of blood tests, and as such was the object of very general criticism in legal periodicals.[3] It may in fairness be said that the decision was capable of ambiguous construction, and while the criticism did not generally take account of the exact words in which the holding was expressed, clarification of the issue was in fact badly needed. This clarification has now been accorded by the court, in its rehearing upon the case last April, when the hearing was limited to the specific point noted.

The heart of the new opinion is contained in the following statement of the court:[4]

> "(1) The reliability of the blood test is universally conceded by competent scientific authorities; (2) a trial court of record in this state has inherent power and authority, in its reviewable discretion, to order the taking of blood for such purposes in cases where paternity is an issue and where, in the opinion of the court, the making and reporting of such test will be, or is likely to be, helpful in ascertaining the truth. We express no opinion at this time as to whether the courts may require a defendant in a criminal case to submit to a blood test or to furnish blood for that purpose."

Except as to the reservation in the last sentence quoted, this is as clear and direct a declaration as could be wished, and it is believed that the Supreme Court of South Dakota deserves therefor the commendation of all who are interested in the progress of the law of evidence. It is true that the above quoted pronouncements of the court were actually dicta, since the judgment against the defendant was affirmed because of the latter's laches in applying for

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[2]State v. Damm, 62 S. D. 123, 252 N. W. 7 (1933).

[3]For good examples of the reaction to the original holding of the court, see Note (1934) 43 YALE L. J. 651, 652-653, and Comment (1934) 32 MICH. L. REV. 987, 994.

[4]State v. Damm, ... S. D. ....., 266 N. W. 667, 671 (1936).

the tests, and because South Dakota trial courts were not at the date of trial (1931) expected to take judicial notice of the trustworthiness of said tests. That the statements of the court were dicta really increases their importance, for there is a strong inference that the rehearing was in likelihood granted for the specific purpose of making them. The court has taken great pains to set at rest all doubt as to its attitude, and it is thought that the case will have its influence on the history of American legal development.

Of course, the opinion here expressed as to the importance of this holding, can only be grounded upon the belief that available scientific evidence now fully warrants the use in all cases involving parentage of the tests in question.[5] An inquiry into the nature of the tests and the degree of their certainty is therefore necessary, and this can best be effected by a condensed historical sketch.

As early as the seventeenth century, certain crude blood transfusions were made, but the fact that the blood of one human being often brought about fatal consequences when injected into another, caused transfusions to be made unlawful,[6] and it was not until 1901 that any real light was thrown upon the etiology of these fatalities.[7] It was in that year that Karl Landsteiner, the great pioneer of blood research, first classified human bloods in three groups, according to the agglutinative interactions of their sera and red cells. These groups are those which are now designated by the letters *O*, *A*, and *B*. A year later others working under his influence discovered the fourth and rarest of the classic groups, the one now designated *AB*.[8] The cells of blood of group *O* are not agglutinated by the serum of any other group, while its serum will agglutinate the cells of any of the other sera. The sera and cells of groups *A* and *B* are reciprocally agglutinative, and also, as pointed out, their cells are agglutinated by the serum of *O*, and their sera agglutinate the cells of *AB*. These data solved the problem of blood transfusion fatalities, for the latter were now plainly resultant from such classifiable agglutinations. Since these basic discoveries of Landsteiner and his followers, transfusions have become routine pro-

[5]It is here appropriate to note the general rule as to when deductions from a new scientific principle become admissible in evidence. It is held that before such deductions may be admitted, the principle or discovery on which they are based must be sufficiently established to have gained general acceptance in the field in which it belongs. An important case so holding is Frye v. United States, 293 Fed. 1013 (App. D. C. 1923), which ruled that the systolic blood-pressure deception test had not then attained such standing.

[6]GATES, HEREDITY IN MAN (1931) 189.

[7]Landsteiner, *The Human Blood Groups* (1928), in THE NEWER KNOWLEDGE OF BACTERIOLOGY AND IMMUNOLOGY (1928) 892.

[8]*Ibid.*

cedure;[9] but perhaps even greater, in eventual value to humanity, has been the application of the blood groups to genetic research.

As early as 1908, the hereditary nature of the blood groups was theorized,[10] and in 1910 extensive data were presented by von Dungern and Hirschfeld,[11] who made the fundamental observation that neither *A* nor *B* can occur in the cells of a child if not present in those of at least one of its parents. Von Dungern and Hirschfeld hypothesized that *A* and *B* were inherited entirely independently of each other, each individual carrying a certain pair of genes, or fundamental hereditary particles, either of which might determine the appearance of *A*, and an analogous separate pair of genes, either of which might determine the presence of *B*. According to this hypothesis, *A* would fail to appear in a given individual only if both genes of the "*A*-pair" were for absence of *A;* and a like statement would apply to the "*B*-pair."

For some years the theory above outlined was accepted, until it was shown, as statistics accumulated as to the percentage of the different groups occurring in various populations, that the facts of such distribution could better be explained by assuming that an individual's blood group was determined by one pair of genes, and not by two, there being in addition to factors for *A* and *B*, a recessive factor *O*, which would have no apparent effect upon an individual's grouping when paired with *A* or *B*, but which when occurring in both places in the pair would cause the appearance of group *O*.[12] The only practical effect of this new theory, which was advanced by Felix Bernstein in 1925, would be to exclude the possibility of an *O* parent's having an *AB* child, or vice versa. Exceptions to the Bernstein theory have apparently been demonstrated, and it now seems best, so it has been stated, to regard it as strong circumstantial evidence rather than absolutely conclusive.[13] The statistical method on which the Bernstein theory is based makes the assumptions that a given population for which the grouping percentages are determined is homogeneous, and that random mating occurs between the blood groups therein. This

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[9] *Id.* at 893, Table II, and at 904 *et seq.*

[10] Ottenberg and Beres, *The Heredity of the Blood Groups* (1928), in THE NEWER KNOWLEDGE OF BACTERIOLOGY AND IMMUNOLOGY, 909-910.

[11] *Id.* at 911; GATES, HEREDITY IN MAN (1931) 192.

[12] The statistical evidence for the Bernstein theory, based on the distribution of the blood groups in different ethnic groups, has been well summarized in Strandskov, *A Statistical Study of the Relative Goodness of Fit of the Two Proposed Theories of Human Blood Group Inheritance* (1931) 21 JOUR. IMMUNOLOGY 261.

[13] Wiener, *On the Usefulness of Blood-Grouping in Medicolegal Cases Involving Blood Relationship* (1933) 24 JOURN. IMMUNOLOGY 443.

method is therefore subject to the difficulty that these conditions are hard to demonstrate.[14]

Certain subgroups of groups *A* and *AB* were early observed, and a plausible theory of their heredity has been formulated, but the evidence is not yet such as to compel acceptance, and even when established the theory will solve only a small number of cases.[15] Vastly more important are the recent new blood groups discovered by Karl Landsteiner and Philip Levine in 1927.[16] These groups cannot be detected by reactions between human bloods, but only through a delicate technique using anti-human-blood sera obtained from animals. It has been possible to classify all the thousands of individuals examined as belonging to one of the new groups *M*, *N*, or *MN*; no connection has been found between the occurrence of these groups and that of the older four; and it has been theorized that the heredity of these groups is determined by a single independent pair of genes, each pair being composed of either two factors for *M*, two factors for *N*, or one of each.[17]

Paternity cannot be *affirmatively* proved by any present tests. Using the four original blood groups, and no other exclusionary principle than that discovered by von Dungern and Hirschfeld, the non-paternity of an unrelated party as to a given child, can be established in over fourteen per cent of the instances.[18] If Bernstein's theory were admitted valid the percentage would be raised to about eighteen per cent;[19] and with the additional aid of the new blood groups of Landsteiner and Levine, non-paternity could be demonstrated in about one third of all cases.[20]

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[14]Jenkins, *Random Mating and Blood Groups* (1931) 21 JOUR. IMMUNOLOGY 279.

[15]Wiener and Rothberg, *Heredity of the Subgroups of Group A and Group AB* (1933) 5 HUMAN BIOLOGY 577.

[16]Landsteiner and Levine, *On Individual Differences in Human Blood* (1928) 47 JOUR. EXP. MED. 757.

[17]Landsteiner and Levine, *On the Inheritance of Agglutinogens of Human Blood Demonstrable by Immune Agglutinins* (1928) 48 JOUR. EXP. MED. 731; Wiener and Vaisberg, *Heredity of the Agglutinogens M and N of Landsteiner and Levine* (1931) 20 JOUR. IMMUNOLOGY 371; Wiener, Rothberg, and Fox, *Heredity of the Agglutinogens M and N of Landsteiner and Levine: Medicolegal Application for the Determination of Non-Paternity* (1932) 23 JOUR. IMMUNOLOGY 63.

[18]Wiener, Lederer, and Polayes, *Studies in Isohemagglutination; On the Chances of Proving Non-Paternity; with Special Reference to Blood Groups* (1930) 19 JOUR. IMMUNOLOGY 259; and also Wiener, *supra* note 13.

[19]Wiener, Lederer, and Polayes, *supra* note 18; Wiener, *supra* note 13.

[20]Wiener, *supra* note 13. Naturally, the chance of determining the innocence of a given innocent defendant will vary according to the grouping of his own blood. Thus an innocent party with blood *AMN* has only about one chance in eleven to prove his non-paternity by the tests, whereas a party with blood *ABN* has about five chances in eight. Hence it may often be of interest to the defense to have a preliminary test made upon the defendant's blood. Useful tables will be found in the citation last given, as well as in Hyman and

A constantly increasing mass of accurate statistical data now compels unhesitating acceptance both of the exclusionary principle discovered by von Dungern and Hirschfeld[21] and also of the stated theory of heredity of the new groups of Landsteiner and Levine;[22] but, as already indicated, better evidence is required in the case of the Bernstein theory. On the basis of the material above set forth and cited, it can be said with complete assurance that the Supreme Court of South Dakota took a timely stand and one subject to no sustainable objections, when it stated its faith in the reliability of blood tests as evidence of parentage.[23]

We must now inquire into the legal aspects of the second portion of the holding; to wit, that a trial court has inherent power, without any authorization by statute, to order in its reviewable discretion the making of a blood test where it regards this as relevant. In civil proceedings it has long been the majority holding that a trial court may in its reviewable discretion order a physical examination of a plaintiff suing for alleged personal injuries.[24] The recognition of this view of the law has come about in some states by judicial holding and in others by legislative action; but

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Snyder, *The Use of Blood Tests for Disputed Paternity in the Courts of Ohio* (1936) 2 OHIO ST. L. J. 203. Tables that give the probabilities exhaustively, but only for the four original groups (which are by far the most easily determined), are available in WIGMORE, EVIDENCE (1934 Supp. to 2d ed.) § 165b.

[21]Wiener, *supra* note 13; *cf.* Wiener, Lederer, and Polayes, *Studies in Isohemagglutination: On the Heredity of the Landsteiner Blood Groups* (1930) 18 JOUR. IMMUNOLOGY 201.

[22]Wiener, Rothberg, and Fox, *supra* note 17; Wiener, *supra* note 13.

[23]It is here perhaps not inappropriate to point out that the legal application of the genetic laws of blood group inheritance, and of other human genetic laws that may in future be determined, is by no means limited to actions for the support of illegitimate children. In cases of accidental interchange and confusion of infants, the blood tests now known will solve about seven cases out of ten. Wiener, *supra* note 13. The tests may also prove useful in the identification of corpses and in the refutation of the claims of pretended heirs. See WIGMORE, EVIDENCE (1934 Supp. to 2d ed.) § 165b, Case 3 on p. 157, and Case 4 on p. 158. It is suggestive to observe that in view of the undoubtedly vast numbers of human hereditary factors, nothing is more sure than that every human individual (except identical twins, triplets, etc.) possesses a unique genetic constitution. When a sufficient number of these factors can be tested and recognized, it will be possible to base upon them the most complete and permanent of conceivable methods of personal identification, as well as an affirmative method of proving parentage (in contradistinction to the purely exclusionary evidence furnished by present blood tests). See the concluding words of § 165a, *op. cit. supra*, where Dean Wigmore briefly but clearly indicates a similar line of thought.

[24]The state of American law in regard to this proposition has been thoroughly analyzed in the following annotations and collections of cases: 4 WIGMORE, EVIDENCE (2d ed. 1923) § 2220, n. 13; *id.* (1934 Supp. to 2d ed.) § 2220, n. 13; Notes (1892) 14 L. R. A. 466; (1910) 23 L. R. A. (N. S.) 463; (1913) 41 L. R. A. (N. S.) 1071; L. R. A. 1915E, 936; (1927) 51 A. L. R. 183.

the United States Supreme Court and a few of the state courts still maintain a contrary holding.[25]

In all arguments as to the right of courts to order the examination of parties plaintiff in relevant cases, the issue is between the right of the defendant to have justice done on the basis of all the facts, and the view that inviolability of the person should be protected even as against the interest of the courts in discovering the truth. In the case of *Union Pacific Ry. Co. v. Botsford*,[26] the majority of the United States Supreme Court upheld the inviolability doctrine and said that this right was "as much invaded by a compulsory stripping and exposure, as by a blow." However, as Dean Wigmore has pointed out, the whole trend of English Law has from ancient times opposed this extreme inviolability, not hesitating to require the most intimate examinations of person, when necessary to the ends of justice.[27] As Justice Brewer well said in a dissenting opinion in the case just cited: "Certainly the power of the courts and of the common law courts to compel a personal examination was, in many cases, often exercised, and unchallenged. Indeed, wherever the interests of justice seem to require such an examination, it was ordered."[28] There is certainly no sound reason for departing in these latter days from the intelligent practice of the ages. The advocacy of the inviolability doctrine may indicate an attitude of sentimental obeisance to an inalienable personal right, which has been so revered that its strict application may potentially serve the furtherance of spurious claims.

There is an obvious analogy between the physical examination which, in the great majority of jurisdictions, can be ordered by the court in a suit for personal injuries, and the blood test made by order of a court in a case where parentage is in issue. To refuse to recognize this analogy would be to force upon the legislatures a proper function of the courts; to wit, the flexible interpretation of well recognized legal principles to cover the new categories of cases that arise in ever increasing numbers in our present-day society. The high court of South Dakota has rightly pointed out that if the taking of blood for examination were a violation of constitutional rights of the citizen, the legislatures would be powerless as the courts to render it lawful.[29] The United States Supreme Court has upheld the validity of a state statute providing

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[25]See note 24, and especially the references to Wigmore.

[26]Union Pacific Ry. Co. v. Botsford, 141 U. S. 250, 35 L. ed. 734 (1891). First excerpt quoted is at 141 U. S. 252, 35 L. ed. 737.

[27]The historical bases of the problem are fully discussed in 4 WIGMORE, EVIDENCE (2d ed. 1923) § 2220.

[28]Union Pacific Ry. Co. v. Botsford, 141 U. S. 250, 258, 35 L. ed. 734, 740 (1891).

[29]State v. Damm, ... S. D. ....., 266 N. W. 667, 670 (1936).

for the physical examination of a party for personal injuries.[30] There is no reason to doubt that in regard to the legal as well as scientific aspects of blood tests, the South Dakota court has outlined a sound policy, and one which should be applicable wherever the English common law prevails.[31]

Daniel Penick Gholson.

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[30]Camden & S. R. Co. v. Stetson, 177 U. S. 172, 44 L. ed. 721 (1900). The decision in this case modified or limited that in the case of Union Pacific Ry. Co. v. Botsford, by holding that a federal court sitting in a state where physical examination of a plaintiff was specifically authorized by state statute, had power to order such an examination. Of course, such a holding affirmed by positive implication the constitutionality of a statute of this nature.

[31]In jurisdictions where it may be held, under a contrary interpretation of the law, that the ordering of blood tests, while not unconstitutional, is not within the existing powers of the courts, there remains the possibility of settling the question by legislative enactment. New York in N. Y. Laws, 1935, c. 196, c. 197, and c. 198, and Wisconsin, in Wis. Laws, 1935, c. 351, have already authorized and delimited by statute the use of blood tests as evidence in those states.

RECENT DECISIONS

CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS—IMPAIRMENT BY LEGISLATIVE ENACTMENT.

The relators sought by mandamus to require the circuit judge to vacate a certain order in a mandamus proceeding, wherein the judge ordered that the relators, within sixty days from date, file in court a duly verified copy of all persons, firms, or corporations who held bonds or certificates of deposit therefor issued by the relators or their duly constituted depository or agency, together with the amounts and descriptions of the bonds or debts held by each. The suit in which the above order was filed was brought by the relators to coerce a tax levy for the payment of bonds and interest coupons. The order sought to be vacated was made pursuant to authority of a Florida statute which provided "that in any suit against any political subdivision or taxing district of this state, wherein plaintiff shall be acting as representative of bondholders or creditors, the judge of the court in which such suit shall be pending, shall upon application of the defendant, enter an order requiring the plaintiff party to file in said court a duly verified copy or statement of all persons, firms, or corporations who are legal and equitable owners of said bonds or debts, or its duly constituted depository or agency together with the amounts and descriptions of bonds or debts, or certificates of deposit therefor, held by each." The bonds and coupons were all issued long prior to the passage of the above-quoted statute. HELD: Statute requiring plaintiff to give names and addresses of all interested parties is unconstitutional, as impairing the obligation of contracts in placing on bondholders a burden which was not contemplated under the laws existing at time bonds were issued. The legislature may not under guise of modifying remedy impair the obligation of contract. *State* ex rel. *Payson* et al. *v. Chillingworth, Circuit Judge,* et al., ... Fla. ....., 165 So. 264 (1936).

The whole question here turns on the point of the validity of the statute of Florida quoted above.[1] The only pretended authority for the entry of the order sought to be vacated is the legislative act. If that act be invalid, then the court was without jurisdiction to enter this order. Hence the point in issue here is whether or not the statute is constitutional. The Constitution of the United States provides: "No state shall . . . pass . . . any law impairing the obligation of contracts."[2] Similar provisions are found in the constitutions of the various states.[3] It is well settled that contracts between municipal corporations and individuals come under the prohibition of the Federal Constitution against laws impairing the obligation of contracts, as well as contracts between individuals.[4] The contractual impairment clause of the Federal Constitution applies to contracts made by the state by its authorized agents or agencies, as well as contracts between private parties.[5] In the opinion rendered in this case the court pointed out that it is well established that the legislature may not under the guise of modifying a remedy impair

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[1]Fla. Laws 1935, c. 16832.

[2]U. S. CONST. Art. I, § 10 (1).

[3]MISS. CONST. 1890, § 16. See Wisconsin Lumber Co. v. State, 97 Miss. 571, 54 So. 247 (1910).

[4]Anders v. Nicholson, 111 Fla. 849, 150 So. 639 (1933).

[5]Hard v. State *ex rel.* Baker, ... Ala. ....., 154 So. 77 (1934); Thompson v. Auditor General, 261 Mich. 624, 247 N. W. 360 (1933).

the obligation of a contract.[6] Hence it is certainly true that a statute passed by a state legislature which takes away the remedy of enforcement of a contract is void, unless it supplies another remedy that is equally efficacious. The courts have uniformly laid down the doctrine that the legislature may not so restrict or condition the remedy of a contract that the enforcement of the plaintiff's rights are materially delayed or embarrassed.[7]

When does an alteration of the remedy on a contract operate to deprive the plaintiff of his constitutional rights within the meaning of the Contract Clause? The general rule applied is that there is an impairment of the obligation of the contract when the value of the contract is substantially lessened.[8] When a political subdivision of a state undertakes to issue bonds, all laws relative thereto in existence at the time, and particularly those under whose authority the bonds were issued, enter into and become a part of the contract. In such case any repeal or alteration of these existing laws which operates to the disadvantage of the bondholder may constitute an impairment of his contract obligation.[9]

The courts have authoritatively stated that, in considering the impairment of the obligation of contracts, such impairment may consist in increasing the burdens of the contract as well as in diminishing the efficiency of the contract.[10] An act may impair the obligation of a contract by encumbering the remedy thereon with new burdens, even though the relief to be eventually derived from such remedy is left intact. Mr. Justice Sutherland in the *Columbia Gas Co.* case said: "The impairment of a contract may consist in increasing the burdens as well as in diminishing the efficiency. Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing new conditions not expressed in the contract, or dispensing with the performance of those which are, however minute or apparently immaterial in their effects upon the contract of the parties, impairs the obligation of contract."[11] Thus he clearly laid down the ways in which the impair-

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[6]12 C. J. 1067.

[7]Oshkosh Waterworks v. Oshkosh, 187 U. S. 437, 23 S. Ct. 234, 49 L. ed. 249 (1903); City of Cleveland, Tenn. v. United States, 166 Fed. 677, 93 C. C. A. 274 (C. C. A. 6th, 1909); Western National Bank of New York v. Reckless, 96 Fed. 70 (D. N. J. 1899); Myers v. Knickerbocker Trust Co. 139 Fed. 111, 71 C. C. A. 199 (C. C. A. 3d, 1905).

[8]Barton v. Conly, 119 Me. 581, 112 Atl. 670 (1921).

[9]Moore v. Otis, 275 Fed. 747 (C. C. A. 8th, 1921); Muller v. McCann, 50 Okla. 710, 151 Pac. 621 (1915); Runnels v. Oklahoma City, 150 Okla. 291, 1 P. (2d) 740 (1931); Columbia County Commissioners v. King, 13 Fla. 451 (1869); Lyon & Matthews Co. v. Modern Order of Praetorians, 142 S. W. 29 (Tex. Civ. App. 1911); Howard v. State, ... Ala. ....., 146 So. 414 (1933). "A state statute which lessens the efficacy of the means for enforcing the obligation of a contract in existence when the obligation was incurred is unconstitutional as impairing the obligation of contracts." City of Cleveland v. United States, 166 Fed. 677, 93 C. C. A. 274 (C. C. A. 6th, 1909); State *ex rel* Sheriff v. Milam, 133 Fla. 491, 153 So. 100 (1933); *In Re* Fidelity State Bank, 35 Idaho 797, 209 Pac. 449 (1922).

[10]Columbia Ry. Gas & Electric Co. v. State of S. C., 43 S. Ct. 306, 261 U. S. 236, 67 L. ed. 629 (1923).

[11]Columbia Ry. Gas & Electric Co. v. State of S. C., 43 S. Ct. 306, 261 U. S. 236, 67 L. ed. 629 (1923); *cf.* Boise Water Co. v. Boise City, 230 U. S. 84 (1913); Green v. Biddle, 5 S. Ct. 547 (1823).

ment of the obligation is made possible. In the instant case, the legislature of Florida has attempted to impose a burden on the bondholders not contemplated at the time of the making of the contract. The legislature, by requiring the plaintiff to file a statement of all the holders of the bonds or certificates of deposit, has placed on him a burden which lessens the value of his contract by encumbering him with a burden not originally contemplated. The Constitution of the State of Florida substantially provides that subsequent legislation cannot annul or diminish, retard or lessen, the efficacy of prior laws entering or forming a part of the contracts with bondholders.[12]

Every purchaser of municipal bonds or securities purchases with the implied knowledge that a writ of mandamus, although itself a legal writ, may be granted only on such terms as are equitably just in the eyes of the court. Mandamus is an extraordinary remedial process which is awarded, not as a matter of right, but in the exercise of sound judicial discretion. Although classed as a legal remedy, in issuing it a court must be largely controlled by equitable principles.[13] For example, the court may distribute a tax ordered to be levied for the payment of bonds over a period of several years,[14] or it may refuse to issue a writ unless the taxes so coerced are applied pro-rata to all bonds of the same issue as those of the plaintiff's.[15]

The limits of the court's discretion in such matters have not as yet been precisely determined. At least it appears that the discretion must be directed towards some feature germane to the controversy. Hence it is possible that even though the present statute had done no more than allow the court a discretion to require a list of depositors, such would have been deemed to be an impairment of the bondholder's contract obligation if an effort were made by the court to act under the authority thereof. The requirement of such a list is not likely to bear any reasonable relationship to a suit between the Committee and the municipality where the interests of the bondholders seem fairly represented by the Committee.

Norman C. Brewer, Jr.

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[12]State *ex rel.* Woman's Ben. Ass'n v. Port of Palm Dist., 121 Fla. 746, 164 So. 851 (1935); 1 COOLEY, CONSTITUTIONAL LIMITATIONS 582.

[13]*Ex Parte* Skinner & Eddy Corp., 265 U. S. 86 (1924); Perry v. Town of Samson, 11 F. (2d) 655, 659 (M. D. Ala. 1926); Cleveland v. United States, 166 Fed. 677, 684 (C. C. A. 6th, 1909); East St. Louis v. Amy, 120 U. S. 600, 7 S. Ct. 739 (1887). "Court granting mandamus, exercises a sound judicial discretion, and should grant such relief on equitable principles, such as will not impose unnecessary hardships." Perry v. Samson, 11 F. (2d) 655, 659 (M. D. Ala., 1926); *cf.* State v. Byrne, 32 Wash. 264, 73 Pac. 394 (1903).

[14]State v. Lehman, ... Fla. ....., 131 So. 533 (1930).

[15]State v. Byrne, 32 Wash. 264, 73 Pac. 394 (1903).

FEDERAL COURTS—BURDEN OF PROOF IN REGARD TO THE JURISDICTIONAL AMOUNT.

General Motors Acceptance Corporation instituted an action to restrain the enforcement of an Indiana Act[1] which provided for the regulation of the business of purchasing contracts arising out of retail installment sales. A final decree was entered by the District Court granting a permanent injunction. The United States Supreme Court, in reversing the District Court on the ground that there was no jurisdiction because of the plaintiff's failure to show that the jurisdictional amount was involved, held that the burden of proving the jurisdictional amount rested on the plaintiff. *McNutt v. Gen. Motors Acceptance Corp.*, ... U. S. ....., 56 S. Ct. 780, 80 L. ed. 816 (1936).

By the Constitution of the United States, a civil suit of this nature in the District Court is definitely limited to one, "where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the constitution or laws of the United States, or treaties made, or which shall be made under their authority, or (b) is between citizens of a state and foreign states, citizens or subjects."[2] In addition, the District Courts are explicitly charged with the duty of enforcing these jurisdictional limitations.[3] In fact, the principle has been laid down in numerous cases that if from the allegations of the plaintiff's pleadings, the court determines that the jurisdictional amount is not involved, under the above mentioned act, it is incumbent upon it to dismiss the cause of action and refuse to hear it. However, a suit cannot be properly dismissed by a district court on the ground that the subject matter is of less value than the jurisdictional amount, unless the facts made to appear on the record create a legal certainty of that conclusion.[4] On the other hand, there are many cases stating the doctrine that there is a presumption that every cause is without the jurisdiction of the Federal Court.[5] Here, the term presumption is likely to be misleading, for evidence is required to remove presumptions, although, as will appear later, mere allegations in the plaintiff's pleadings will give jurisdiction. What the court apparently meant was that jurisdiction must be shown either in the plaintiff's pleadings or in his evidence.

In a discussion as to the party upon whom the burden of proof rests in regard to the jurisdictional amount, the greatest difficulty arises in clearing up a confusion between rules of pleading and rules of evidence and in the application of evidentiary terms to problems which do not involve evidence exclusively. It has been shown that the jurisdiction of the United States Dis-

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[1]Chapter 231 of the Acts of 1935 of the General Assembly of Indiana.

[2]Judicial Code, § 24 (1); 28 U. S. C., § 41 (1); 28 U. S. C. A., § 41 (1).

[3]Jud. Code, § 37; 28 U. S. C. A., § 80. (§ 37 of Judicial Code with the substitution of district court for circuit court is a reenactment of the Act of March 3, 1875, Ch. 137, 19 Stat., 470).

[4]Wetmore v. Rymer, 169 U. S. 115, 42 L. ed. 682, 18 S. Ct. 293 (1898); North Pacific Steamship Co. v. Soley, 257 U. S. 216, 66 L. ed. 203, 42 S. Ct. 87 (1921); Williams v. Nottaws, 104 U. S. 211, 26 L. ed. 720 (1881); Perez v. Canadian Land and Fur Co., 14 F. (2d) 181, (La. 1926); Barry v. Edmunds, 116 U. S. 550, 29 L. ed. 729, 6 S. Ct. 501 (1886).

[5]*Ex Parte* Smith, 94 U. S. 455 (1876); Sound Marine & Machine Corporation v. Westchester County, 15 F. Supp. 812 (S. D. N. Y. 1936); see also 6 HUGHES, FEDERAL PRACTICE 507, § 4058.

trict Courts is limited by the Constitution, that there is a duty resting upon the court to enforce these limitations, and that in every case the jurisdictional requirements must be shown. Also, it is manifest that the court may of its own motion examine both the pleadings and the record of evidence to determine to its own satisfaction whether or not the amount involved complies with this requirement.[6] But what is incumbent upon the plaintiff in regard to the jurisdictional amount in the pleadings? Often it is said that the jurisdictional amount must appear affirmatively in the pleadings.[7] By affirmatively, the court seems to mean that the amount must appear directly and not by inference or argument.[8] This does not imply that the allegation should appear formally in a separate paragraph.

A situation may arise wherein the jurisdictional amount fails to appear in the pleadings but yet is clearly and affirmatively shown from the evidence in the record. Should the court nevertheless dismiss the case for lack of jurisdiction? Although there are a number of decisions stating that the jurisdictional amount must appear in the pleadings, yet in other decisions it is stated that the amount must appear in the pleadings *or* in the record.[9] This seems to indicate that if the court finds the jurisdictional amount appearing in any manner during the course of the trial, it will not dismiss the case. This conclusion is further supported by the fact that no case has been found where there was clear evidence of the jurisdictional amount and where the court nevertheless dismissed the case for lack of jurisdiction because the amount did not appear in the pleadings.

Of course, it is thoroughly possible that the court may be satisfied from the pleadings that the jurisdictional amount is involved even though no evidence to this effect appears, because the question is not one of evidence as distinguished from pleading. Suppose that the court is not satisfied from the pleadings, and that it examines the record to determine whether the amount is sufficient. Does this mean that the burden is upon the plaintiff to show jurisdiction? Language directly to this effect was certainly used by the Supreme Court in the case under discussion.[10] If the term *burden* is used

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[6]Wetmore v. Rymer, 169 U. S. 115, 42 L. ed. 682, 18 S. Ct. 293 (1898); Gilbert v. David, 235 U. S. 561, 59 L. ed. 360 (1914).

[7]Hanford v. Davies, 163 U. S. 273, 16 S. Ct. 1051 (1895); Grace *et al.* v. American Central Ins. Co., 109 U. S. 278 (1883); Turner v. Bank of North America, 4 Dall. 8, 1 U. S. 718 (1799); Lehigh Mining & Mfg. Co. v. Kelly, 160 U. S. 327, 16 S. Ct. 307 (1895); Young v. Main, 72 F. (2d) 640 (C. C. A. 8th, 1934); Kellogg v. Nat. Biscuit Co., 4 F. Supp. 889 (S. D. N. Y. 1932); Nat. Lock v. Chicago Regional Labor Board, 8 F. Supp. 820 (N. D. Ill. 1934).

[8]*Ibid.*

[9]Mathers & Mathers v. Urschel, 74 F. (2d) 591 (C. C. A. 10th, 1935); Hume v. Maham, 1 F. Supp. 142 (E. D. Ky. 1932); Cole v. Blakenship, 30 F. (2d) 211 (C. C. A. 4th, 1929); Abbott v. Eastern Mass. St. Ry. Co., 19 F. (2d) 463 (C. C. A. 1st, 1927); California Atlantic S. S. Co. v. Central Door & Lumber Co., 206 Fed. 5 (C. C. A. 9th, 1913); Danks v. Gordon, 272 Fed. 821 (C. C. A. 2d, 1921); Collings *et al.* v. Guarantee Trust Co., 10 F. Supp. 462 (D. N. J. 1934) (there was no allegation of the jurisdictional amount, but the facts stated in the complaint clearly showed the amount was in excess of the required sum).

[10]Miller *et al.* v. First Service Corporation, 84 F. (2d) 680 (C. C. A. 8th, 1936); Electro-Therapy Products Corp., Ltd. v. Strong *et al.*, 84 F. (2d) 766 (C. C. A. 9th, 1936).

loosely to mean that there must be a showing of jurisdiction in the record, then we may say that the court is correct in its terminology; but, more aptly, the question is whether or not the court is satisfied that jurisdiction obtains. In such case it makes no difference whether the evidence showing this fact comes from the plaintiff, the defendant, or from evidence gathered by the court itself. It may even be satisfied by the plaintiff's pleadings. The term "burden of proof" in its technical sense implies that there must be evidence. Since it is possible for the plaintiff to secure the jurisdiction of the court merely by his pleadings it is perhaps more accurate to say that the *burden of showing jurisdiction* rests on the plaintiff. An adverse holding in this respect operates to his exclusive disadvantage.

Is the above situation altered if the defendant denies that there is jurisdiction? The burden of showing jurisdiction exists independently of denial; however, the court may be satisfied from the pleadings alone that the jurisdictional amount is involved, and, although it may require evidence, it need not do so. It appears that the only effect of a denial is to impose affirmatively on the plaintiff the task of supplementing allegations with proof.

If the plaintiff has shown the court from the pleadings and record that the jurisdictional amount is involved, and the defendant wishes to make a contrary showing, and in doing so relies on new evidence of his own to this effect, rather than a mere general denial of the plaintiff's allegations, it can be definitely stated that the burden of producing this evidence rests upon the defendant. In such case the court may say that the burden of proof rests upon the defendant,[11] but again this appears to be a misuse of the term "burden of proof." In reality, the defendant assumes only the burden of producing this new evidence, and, in the last analysis, when all the evidence is in the court again must be persuaded that the jurisdictional amount is present.

Strictly speaking, the term "burden of proof" is applied to the task of persuading the jury. On the other hand, the function of determining whether or not the jurisdictional amount is involved rests upon the court, although it may submit the issue to the jury if it so desires.[12] Since the issue is not strictly one of fact in the accepted sense of being a question peculiarly within the province of the jury the use of evidentiary terms is unfortunate.

Chester H. Curtis

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[11]Sheppard v. Graves, 14 How. 505, 14 L. ed. 518 (1852); Bjornquist v. Boston & A. R. Co., 250 Fed. 929, 5 A. L. R. 951 (C. C. A. 9th, 1918).

[12]Wetmore v. Rymer, 169 U. S. 115, 42 L. ed. 682, 18 S. Ct. 293 (1898).

TORTIOUS INTERFERENCE WITH CONTRACT—NECESSITY THAT PLAINTIFF BE PARTY TO REPUDIATED AGREEMENT—ACTION BY ONE WHO HAS DEPENDENT CONTRACT.

A had a contract with *B* to lease premises and equipment to the latter for work to be done by *B* under his contract with *C*. *X* induced *C* to breach his contract with *B*, thereby rendering *A*'s contract worthless. *A* instituted the present action against *X*. On demurrer it was held that since it did not appear in the complaint that *B* had a binding contract with *C* no cause of action was stated. It was not decided whether or not *A* would have been granted relief had he shown affirmatively that there was a contractual relationship between *B* and *C*. Assuming that *A* is able to show this fact on a subsequent hearing an interesting problem is raised. *Du-Art Film Laboratories v. Consolidated Film Industries*, 15 F. Supp. 686 (S. D. N. Y. 1936).

The problem assumed poses an unusual factual situation on which very little authority is to be found. To allow recovery courts must go beyond the usual picture presented when the contract whose breach the defendant induced was one to which the plaintiff was a party. In this latter situation the tendency of most courts today is toward allowing recovery.[1] Some courts still deny relief unless there is a master-servant relationship, or unless the defendant used deceit, fraud, or coercion as a means to procure the breach.[2] A few courts would impose even greater restrictions on the maintenance of the action.[3] But the majority rule would permit recovery whenever the defendant has actually persuaded the promisor to breach his contract. And, a few courts would take a still more liberal view and allow recovery if the defendant's conduct was responsible for the breach even though he did not directly persuade the contractor to abandon the bargain.[4] Thus there is little uniformity among the courts even in those situations where the plaintiff is a party to the broken agreement.

According to the majority rule *X*'s conduct was apparently such as would have given rise to a cause of action in favor of an injured party to the contract.[5] But from the standpoint of logic and precedent a refusal of relief to *A* under the facts assumed would seem to be justified. Here no one was induced to breach any contract to which *A* was a party. It is evident that the courts must enlarge the scope of the remedy in such cases before recovery can likely be had under the theory of inducing breach of contract.[6]

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[1]Lumley v. Gye, 2 E. & B. 216 (Q. B. 1853) is the celebrated authority for such a holding. Accord: Beekman v. Marsters, 195 Mass. 205, 80 N. E. 817 (1907); Tennessee Coal, Iron & R. Co. v. Kelly, 163 Ala. 348, 50 So. 1008 (1909); Chipley v. Atkinson, 23 Fla. 206, 1 So. 934 (1887); Tubular Rivet & Stud Co. v. Exeter Boot & Shoe Co., 159 Fed. 894 (1908).

[2]Brooks v. Patterson, 234 Ky. 757, 29 S. W. (2d) 26 (1930).

[3]Jackson v. Morgan, 49 Ind. App. 376, 94 N. E. 1021 (1911); Darnell v. Toney, 41 Ga. App. 673, 154 S. E. 379 (1930).

[4]Carson v. Stephens, 14 La. App. 272, 129 So. 381 (1930).

[5]Those jurisdictions which allow recovery for interference where the plaintiff is a party to the contract are set out, note 1, *supra*.

[6]Roberts v. Clark, 103 S. W. 417 (Tex. Civ. App. 1907) is similar to the instant case, except that in it there were clearly not two enforceable contracts. There Roberts, a real estate broker procured Clark to purchase some property from McGregor. As a consequence thereof Clark contracted with

If the tort of inducing breach of contract is not sufficiently broad to cover this situation, is there any other theory to which *A* may resort in order to obtain relief? One writer has urged[7] that a tortious interference with contract relations may consist, first, of an inducement by the defendant resulting in a breach of the contract, or, secondly, of a commission of some culpable act which makes performance more burdensome, impossible, or which destroys the value of the contract to the person entitled thereto. If a recovery is to be had at all in the case assumed it must be by virtue of some such reasoning as that above. Certainly the conduct of *X* resulted in a destruction of the value of *A*'s contract. However, in all cases which lend color to the proposition advanced above there will be found to exist an independent wrong.[8] This wrong usually consists in some tortious act done with the avowed purpose of injuring the contractual relationship, and which makes physical performance of the contract difficult or impossible.[9] In the present case there would doubtless be an independent wrong;[10] namely, the wrong suffered by *B* when *C* was induced to breach his contract. However, this is far from showing that the act was done with the purpose of injuring *A*'s relationship with *B*. Is a tort of this nature sufficient to support an action in favor of *A*? In deciding the case from which this problem is taken the court uses the following language: "The principles of free competition justify a man in getting business for himself, so long as he does not use fraud, deception, or inducement of his customer to breach an existing contract with another." Here the tort of inducing breach of contract is probably too far removed from the cause of *A*'s complaint to answer the above question in the affirmative. This seems to confine recovery to those acts intended to injure the contractual relationship.

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McGregor making a deposit as a guarantee of performance. Morrison claims to have participated in the transaction and demanded part of Roberts' commission. Roberts refused whereupon Morrison persuaded Clark to induce McGregor to repudiate his agreement with Clark thereby destroying Robert's possibility of securing his commission. Roberts was held to have no right against Clark or Morrison. Clark was held to have a right to forfeit the deposit made and abandon the bargain.

[7]Carpenter, *Interference with Contract Relations* (1928) 41 HARV. L. REV. 728.

[8]McNary v. Chamberlain, 34 Conn. 384, 91 Am. Dec. 732 (1867) falls within this category. There the defendant placed rocks on a road which plaintiff was under contract to construct. Gregory v. Brooks, 35 Conn. 437, 95 Am. Dec. 278 (1868) and Hughes v. McDonough, 43 N. J. L. 459 (1881) are in accord.

[9]In Conn. Mutual Life Ins. Co. v. N. Y. & N. H. Ry. Co., 25 Conn. 265, 65 Am. Dec. 771 (1856) it was held that the railroad was not liable to the insurance company for the death of a policy holder caused by the negligent operation of the train. In Sinram v. Pennsylvania R. R. Co., 61 F. (2d) 767 (C. C. A. 2d, 1932) an underwriter was denied recovery against a tug owner for negligently sinking the tug. But in Cue v. Breland, 78 Miss. 864, 29 So. 850 (1901) the court allowed recovery against a defendant who had destroyed a bridge.

[10]See Green, *Relational Interests* (1935) 30 ILL. L. REV. 1.

LIBEL—OPTICAL ILLUSION—PRIMA FACIE ACTIONABLE.

Defendant publishing company published pictures of the plaintiff in cigarette advertisement. Words quoted the plaintiff as declaring that "Camel" cigarettes "restored" him after "a crowded business day." One photograph of the plaintiff, although not itself objectionable, bore a subtitle, "Get a lift with a Camel." The other photograph, which, coupled with this subtitle, was the basis of the complaint, portrayed plaintiff carrying a saddle in front of him below his waist in such a manner that the girth thrown across the seat appeared to be a part of the plaintiff's body. So regarded it became monstrous and obscene, which fact plaintiff alleges subjected him to ridicule and contempt, and for which he sues in libel. HELD: Because the picture taken with the legends was calculated to expose the plaintiff to more than trivial ridicule, it was prima facie actionable. *Burton v. Crowell Publishing Company*, 82 F. (2d) 154 (C. C. A. 2d, 1936).

The term "reputation" is generally confined in law to the esteem with which one is regarded by his fellow man. Hence, a statement cannot impair the reputation unless it in some way lowers this esteem. The law does not purport to protect the sensibilities of the complainant, nor to afford him relief merely because he has been placed in an embarrassing situation. It is this limitation on the scope of the remedy of libel which underlies the doctrine that a degrading statement made to the plaintiff alone is not actionable irrespective of the fact that the utterance caused him great anxiety.[1]

It is generally held that the reputation is impaired when the plaintiff is subjected to "ridicule" and "contempt."[2] But this does not imply mere laughter, for a person may be placed in a painfully laughable situation among his fellow men without being lowered in their esteem. Thus it has been held that laughter untinged with contempt does not constitute ridicule.[3] Ordinary political caricatures present a somewhat similar, but easily distinguishable situation. In such case the plaintiff is made ridiculous by the drawing, but this alone is not the basis of his grievance. His complaint is that such caricature contains a derogatory implication which will likely be seized on and believed by the average reader.[4] No case allowing recovery for a caricature has been found in which the sole cause of complaint was an exaggeration of some physical characteristic, and which would immediately be understood by an average reader as a distortion of the cartoonist's pen.

So long as reputation involves the idea of esteem in the eyes of one's fellowmen and libel implies a statement or its equivalent which detracts from that esteem, truth or falsity of such statement remains a primary legal con-

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[1]Terwilliger v. Wands, 17 N. Y. 54, 72 Am. Dec. 420 (1858).

[2]Montgomery v. Knox, 23 Fla. 595, 3 So. 211 (1887); Marion v. Davis, 217 Ala. 16, 114 So. 357 (1927); Haddad v. McDowell, 112 Cal. App. 295, 296 Pac. 635 (1931).

[3]Lamberti v. Sun Printing-Publishing Ass'n, 111 App. Div. 437, 97 N. Y. Supp. 694 (1906).

[4]Brown v. Barrington, 208 Mass. 600, 95 N. E. 655 (1911) (Cartoon labeled "City Farm" depicted the poor conditions existing at that institution, and left the impression that it was due to the negligence of the mayor); Dunlop v. Dunlop Rubber Co., 1 Irish Ch. & Ld. Com. 280 (1920); Zbysko v. New York American, 228 App. Div. 277, 239 N. Y. Supp. 411 (1930).

sideration.[5] If, however, the concept of libel is to be extended beyond reputation to a protection against emotionally embarrassing situations it follows that the truth or falsity of the statements giving rise thereto will be of no consequence. Hence the court in the instant case found no difficulty in minimizing the importance of the truth or falsity of the alleged libellous utterance.[6]

The decision in this instance might also be explained on the ground of an invasion of the right of privacy, but this would require an extension likewise of that doctrine. The basis of the "right of privacy" is the publication of the plaintiff's picture without his consent.[7] In the instant case the plaintiff gave his consent to a publication of his picture, but not to the publication of this insulting caricature. Furthermore, he would certainly not have consented to its use had it been shown to him before publication. Whether or not a violation of such an implied limitation on the plaintiff's consent is sufficient ground for an action based on violation of the right of privacy is debatable.

The courts have refused recovery in cases where there was no property right in the exclusive use of a plaintiff's likeness,[8] but since the picture involved in the instant case was used in a commercial advertisement we must conclude that the plaintiff's name and his photograph were of definite commercial value and hence fell within the accepted category of property rights.[9]

It seems that the violation of the right of privacy would have been the proper ground on which to base this cause of action. Recovery in this form would be more in accord with the true nature of plaintiff's injury. In the last analysis the right of privacy approaches legal protection of the sensibilities.

Nugent Shands

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[5]Iasigi v. Brown, 17 How. 194, 15 L. ed. 208 (1854); Courier-Journal Co. v. Phillips, 142 Ky. 372, 134 S. W. 446 (1911); Jarnigan v. Fleming, 43 Miss. 710, 5 Am. Rep. 514 (1870).

[6]The court said, "If the advertising is a libel, it is such in spite of the fact that it asserts nothing whatever about the plaintiff, even by the remotest implications."

[7]Pavesich v. New England Life Insurance Co., 122 Ga. 190, 50 S. E. 68 (1905); Foster Milburn Co. v. Chinn, 134 Ky. 424, 120 S. W. 364, 34 L. R. A. (N. S.) 1137 (1909).

[8]Henry v. Cherry & Webb, 30 R. I. 13, 73 Atl. 97 (1909); Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442 (1902).

[9]Pavesich v. New England Life Insurance Co., 122 Ga. 190, 50 S. E. 68 (1905); Foster Milburn Co. v. Chinn, 134 Ky. 424, 120 S. W. 364, 34 L. R. A. (N. S.) 1137 (1909).

BOOK REVIEWS

LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS, by Charles Gregory.[1] Chicago: University of Chicago Press. 1936. Pp. xiii, 200. $2.00.

Anyone interested in the development of tort law in Mississippi will read this volume with avid interest. Lawyers in this state are likely predisposed toward Professor Gregory's thesis because we have already adopted the practice in negligence actions of distributing loss proportionately to the fault involved.[2] But if the reader is of opinion that we have achieved anything like a satisfactory solution of the problem he will find the result of Professor Gregory's investigation disillusioning. Our statute has provided a splendid introduction, but the major task lies yet ahead.

In offering a solution of the problem of scientific loss distribution the author considers two tort doctrines, neither of which the common law has as yet completely recognized. The first of these is the doctrine of comparative negligence, the second is that of allowing contribution between joint negligent tortfeasors. Both doctrines are predicated on the single idea that no litigant should be denied relief merely because he himself may be partially at fault. This tenet is not thoroughly at home in the common law. Our traditional policy has been to deny a guilty trespasser any right to indemnity. The conventional belief is that such a person has placed himself without the pale of the law by contemning it. Although later developments have softened the early rigor of this policy to some extent, yet the present status of the law in respect to both doctrines is highly unsatisfactory. It is the author's thesis that any change desired may be best effected by legislation. Hence he suggests a procedure whereby the two doctrines may be coördinately recognized and so applied as to distribute the loss of all parties concerned in a single hearing.

The starting point for any such reform is an unconditional acceptance of the proposition that loss must and can be distributed among the several parties in proportion to their fault. The author does not argue his hypothesis; he assumes it. He assumes likewise that his reader shares his conviction. However, regardless of my sympathetic predisposition for this thesis I must nevertheless confess that at times I have seriously doubted that any fair apportionment of loss can be made on the sole basis of abstract fault. It is difficult to assume dogmatically that the extent of recovery should always be commensurate with the degree of fault involved. The term, fault, implies much more than blameworthy conduct at the time of the accident. It also embraces broad ideas of social and economic policy. Often the more important of these policies are subordinated in the minds of the jury to less vital but more obvious considerations. Hence, as we increase the prominence of the fault concept and attempt to subject it to finer graduations we likewise magnify the obvious defects of the jury system. Professor Leflar has observed that the only effect of those comparative negligence statutes which have passed under his observation has been to increase the number of recoveries by plaintiffs without affecting their amount.[3] Undoubtedly there are sufficient answers to these objections, some of which are at once apparent, but they are not to be

[1] Professor of Law, University of Chicago Law School.
[2] MISS. CODE ANN. (1930) § 511.
[3] See Book Review (1936) 50 HARV. L. REV. 151, 153.

found in the volume reviewed. However, a book should be judged solely by how completely it fulfills its purpose. Professor Gregory does not seek to convince the skeptical but rather to point out a practical path for the devotee. He has achieved this purpose admirably through making frank criticism of existing statutes and further, by devising a model statute of distressing complexity.

The obvious objection to the proposed enactment lies in the involution of its procedural machinery. Controversies concerning three or more litigants must be solved in a single action. Issues and cross issues are necessarily rampant, since each litigant may have contributed to his own injury and, in varying degrees, to the injuries of all other parties concerned. Yet a single hearing is an inescapable necessity if a fair distribution is to be achieved. There are further complications. A method must be devised whereby any party, plaintiff or defendant, may interplead anyone believed to share in the fault. By necessity this right to interplead must exist irrespective of the plaintiff's possible unwillingness to seek personal redress against the party interpleaded. If the latter contributed to the loss the defendant is entitled, by claiming contribution, to place that portion of the loss on the proper shoulders. Furthermore, an appeal must be allowed from each and every issue, and retrials of fragmentary portions of the litigation become a necessity. This, in turn, gives rise to the problem of preventing unconscionable delays in execution of judgment.

All these obstacles, together with others of equal magnitude, are squarely faced by the author. I have been forced to the conclusion that the proposed enactment, despite its manifold provisions, has reduced the procedure to its rudiments. The complexity of the solution lies wholly within the scope of the problem. The reader will thank Professor Gregory for disclosing this fact. The incapacity of our machinery places certain outside limits on the effectiveness of legal action. Do these limits forestall a fair distribution of loss in negligence actions? This, in a final analysis, is the real problem. In answer the author points to the successful operation of the Ontario statute[4] on which his own model enactment is based. We in Mississippi must weigh the suggested legislation against the background of our own procedural and administrative machinery. But this fact remains: if we are content with a simpler statute it must be with the realization that we are doing only a part of the job. Herein lies the value of the book. It is most highly commended to your attention.

*Wex S. Malone**

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[4]ONT. STATS. 20 GEO. V, c. 27 (1930), amended in 21 GEO. V, c. 26 (1931).

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CORPORATIONS, by Robert S. Stevens. Saint Paul: West Publishing Company. 1936. Pp. xvi, 946. $5.00.

In view of the present tendency toward governmental regulation of the "private" affairs of business associations in general and corporations especially, and the tax policies of the national and most state governments, a thorough inquiry into the nature of corporations and the relation of the stockholder to his corporation is now particularly desirable. The author of this book on corporations has made such an inquiry in an excellent way. His conclusion is that the theory of a corporate person separate and distinct from the shareholders should be discarded and the "corporate personality" of the shareholders substituted therefor. This idea is the foundation upon which he rests his whole treatment of the problems of corporation law.

The keynote is the statement that: "The chief obstacle to the practical development of the law of associations, both incorporated and unincorporated, has been the persistence of this conception of a corporation as a fictitious, nonphysical person and the persistence of the dependent corollary proposition that the members of associations cannot have group personality unless, with sovereign assent, the association has become a corporate entity." Abandonment of this conception of a corporation is urged in order to strike down the corollary and treat all types of associations realistically as collections of individuals, who are to be given a group "personality" when the court deems that advisable and considered as individual "personalities" at other times. The corporate fiction is said to be "scaffolding, useful, almost necessary, in construction, but after the building is erected, serving only to obscure it."

The author's discussion of the early development of corporations leads one to the conclusion that the idea of a corporate person could have been dispensed with in the construction of the house." However, it seems that the builders worked without blue prints and the "scaffolding" has been so firmly built into the whole structure that to remove it now would necessitate extensive remodeling, causing more confusion to the occupants, and especially to law students on an initial tour of inspection, than the ultimate beautification justifies. The author's discussion of particular problems shows that the desirable result can be, and in many cases has been, reached under the orthodox theory. Other desirable changes, it seems to the reviewer, should be made by the legislature. In the rush to realism we should not abandon those established principles—however questionable their origins—which are helpful.

The author says we should think of a corporation as "they" but generally speak of "them" and treat "them" as if "they" were "it." The reviewer believes that most people speak of the corporation as "they" but mentally picture this "they" as something separate and distinct from the shareholders, and that this popular conception has been adopted by legislatures. If that be true, the courts should not change the legislative policy of a separate person. The corollary that courts cannot consider the dual personality of unincorporated associations does not seem to the reviewer to be a true one and so it can be discarded without changing our conception of incorporated associations. The author's treatment of the duties of promoters and directors to shareholders is unusually clear and in accord with the modern trend toward a higher plane of business ethics. However, the attainment of the desired re-

lations does not require the adoption of his view that persons in these positions owe their duties to "them" and not to "it." There might easily be a duty to "it" and a duty to "him."

The *ultra vires* problem is treated as one of agency. A distinction is drawn between acts which are illegal, prohibited by law, or against public policy, and acts which are *ultra vires* because beyond the scope of the corporate purposes as stated in the certificate of incorporation. The State is said to be interested in the first class only, and acts falling within the second are considered to be matters involving the principles of agency and concerning only the directors, the stockholders, and those dealing with the corporation. Third persons should not, the author thinks, be charged with notice of the provisions of the certificate of incorporation except when the reasonable precautions required of one dealing with an agent would lead them to investigate the provisions of the certificate. This involves the geographical accessibility of the information. Unanimous assent of the stockholders to an *ultra vires* act as distinguished from an illegal act is said to authorize or ratify it. Such unanimous assent is said to be inferable from the stockholders' negligent inattention to corporate affairs and suit by the corporation is said to be ratification. The author does not discuss the question of whether a small shareholder in a large corporation is so negligent in not reading and understanding its certificates of incorporation that he will be deemed to assent to an unauthorized act; nor does he state how a suit, usually instituted by the directors without the shareholders' knowledge, can show the unanimous assent said to be necessary to constitute ratification. The "powers" of corporations are regarded as quite broad in scope. The argument that corporate gifts to charity not connected with corporate business should be permitted because it is in the public interest to avoid concentration of wealth in the hands of incorporated associations seems to be more consistent with the old entity theory of corporateness than with the idea that the shareholders own corporate assets and the directors owe their duties to the individual shareholders. The wisdom of encouraging directors to share with the public the wealth of the stockholders is doubtful. On the whole, the discussion of the *ultra vires* question seems to the reviewer to be the most helpful portion of the book. It is done in an extremely able fashion.

The discussion of the various classes of stock and of the right of the stockholders to dividends, the right of inspection of books and the preemptive right is thorough and clear. The voting power and responsibilities of the voting shareholders to the holders of non-voting stock is examined at length. The voting shareholders are said to be in a fiduciary relation to the holders of non-voting stock, and it is said to be the duty of each voter to vote in interest of the entire group rather than in self interest. If this is intended to go beyond a condemnation of graft, the statement is doubtful. Small shareholders in large corporations and especially holders of non-voting, preferred stock are likened to creditors, lending money to the corporation. This is undoubtedly the attitude of small stockholders. Thus it seems that the tendency among them is to regard the corporation as a person distinct from shareholders. Considering this attitude and the fact that the shareholders, unlike the director, is self appointed, the existence of a true fiduciary relation between shareholders is to be doubted.

The care required of directors in managing corporate affairs is held to be that of the ordinary prudent man in a similar position. This is qualified by a recognition of the difference between the position of a director in a large corporation and a director in a small, local corporation whose qualifications were known to the majority of shareholders when he was elected. The principles of agency are applied to the director-shareholder relation. Directors are held to be under a duty to disclose inside information when buying stock from other shareholders, unless the shareholder has set his own price, which probably covers purchases by the director on the stock exchange. The problems of a bonus to officers and directors are made to turn upon the presence of good faith and consideration of the corporate welfare.

Statutes requiring the filing in a public office of a statement of the corporation's financial plan, including a description and valuation of consideration, other than cash, received for stock are approved as a protection to creditors against over valuation, since the creditors are thus put on notice. To the reviewer it seems that such statutes do little good as the only creditors likely to examine the statements are those with experience enough to examine present values rather than the original valuation put on the assets by the directors.

This book is a valuable contribution to corporation law. The text and footnotes are filled with a large number of well-selected decisions and statutes. The reader is impressed with the author's literary style, the force of his reasoning, and the tremendous study which has preceded the writing of the book.

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